CHINA AND SOME PHASES OF INTERNATIONAL LAW

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CHINA AND SOME PHASES OF INTERNATIONAL LAW

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FOREWORD

MODERN international law is in principle a universal system applicable equally to all members of the family of nations. Historically, however, it is a system which developed among the Christian states of Europe in the sixteenth century. Gradually the area of its acceptance expanded outside of Europe and outside of Christianity, but it is only natural that it should have been subjected to different interpretations by states with a different environment and a different historical background.

These differences have not always been noticed by writers who regarded international law as a development of abstract principles of natural law, but positivists have long taken an interest in the actual interpretations and applications of international law in the legislation, diplomatic practice, and jurisprudence of different states. The publications of the Harvard Research in International Law, the Annual Digest of Public International Law Cases, Fontis Juris Gentium, and other publications have in recent years made available documents illustrative of such national interpretations on many topics. The special attitudes of the United States, Great Britain, and the Latin American countries, all of them long members of the family of nations but somewhat outside of the complex of relations and traditions of Continental Europe, have been recorded in treatises and compilations. The rise of communism, fascism, and nazism has produced new philosophies of international relations, and monographs have dealt with international law as interpreted in the countries affected by these doctrines.

These countries, however, all have a tradition of European, Christian culture. The interpretation of international law in countries without this tradition—the Moslem countries, India, Japan and China—present a peculiar interest. These countries include more than half of the world's population, and international law as a universal system is certain to be greatly affected by their attitudes. Treatises have been written on the conceptions of international

relations within these countries at early periods, prior to their incorporation in the world family of nations. There have also been expositions of the application of international law by China and Japan in wars and incidents of recent times.

No general treatise on the interpretation of international law in modern China has, however, been published until the present volume. The subject is so vast that Dr. Tung does not attempt to deal with all its phases. He excludes the laws of war, neutrality and treaties. He does, however, deal with general principles of the law of peace—jurisdiction over territories, ships and persons; nationality; diplomatic and consular relations; and pacific settlement of disputes. While utilizing the diplomatic, legislative and judicial materials of recent years, he has kept in mind the ancient traditions of China, which, up to the time of the republic, made that country hesitate to accept wholeheartedly the principles of territorial sovereignty and diplomatic equality underlying modern international law. He emphasizes the extent to which China under the republic has reversed this position and, while adapting its legislation to fulfill within its jurisdiction the obligations required by these doctrines, has insisted that unequal treaties which deprive China of the advantages of territorial sovereignty and equality must be eliminated. The progress which China has made toward utilization of the methods of pacific settlement recognized by modern international law is clearly dealt with in the final chapter.

The influence of China upon world affairs will increase during the coming century, and Dr. Tung's pioneer examination of the interpretation of international law by his country will contribute toward an understanding of the nature of that influence.

QUINCY WRIGHT

AUTHOR'S PREFACE

IN recent years, students of international law have gradually become interested in discovering the conceptions of various rules of international law entertained by different States. There already exist such works as C. C. Hyde's *International Law Chiefly As Interpreted and Applied by the United States,* H. A. Smith's *Great Britain and the Law of Nations,* T. A. Taracouzio's *The Soviet Union and International Law,* and N. MacKenzie and L. H. Laing's *Canada and the Law of Nations.* As yet no comparable work concerning China has appeared. In view of China's early development of the rudimentary rules of international law during the later period of the Chou dynasty and in view of her political as well as geographical importance as a member of the family of nations, a study of the Chinese conception of international law should yield significant results.

In this study an attempt has been made to reveal the attitude of the Chinese government toward certain selected phases of international law. Other subjects, such as the law of treaties and the laws of war and neutrality, are not discussed here, either for the reason that they have already been dealt with in other treatises or because adequate material for discovering the Chinese attitude regarding them has not been available. This study is further limited in that it treats in detail only the modern period of Chinese international relations, from the middle of the nineteenth century to the present time. However, Chinese traditional ideas and practices are sometimes reviewed if they have served to influence the present conception of international law.

The information upon which this study is based has been obtained largely from (1) Chinese national laws, (2) treaties and agreements with or concerning China, (3) diplomatic correspondence between China and other nations, (4) minutes and proceedings of various international conferences in which China has participated, (5) documents and literature of the Nationalist Party, and (6) decisions of

judicial courts and arbitration tribunals. The decisions of the Chinese Supreme Court are omitted chiefly owing to the fact that cases submitted to that tribunal involving foreign nationals and their interests have been very few as a result of the extraterritorial system, and also because a complete set of these decisions is not available. Extensive reference has been made to standard treatises and to a number of articles and special studies dealing with various aspects of international law or China's foreign relations.

There are three outstanding features characterizing China's modern international relations. First, the Imperial Court of the Ch'ing dynasty was extremely hesitant to adhere to the general practice of the family of nations in their mutual relations. This attitude was especially manifest in matters relating to diplomatic intercourse, such as the sending of diplomatic missions abroad, the recognition of the right of foreign envoys residing at the capital, and the court ceremonies and audiences accorded to them. Owing to China's gradual acquaintance with the conditions of Western countries and the current rules of international law, however, the trend was definitedly changing by the latter part of the nineteenth century. Since the establishment of the Republic in 1912, the Chinese government has fully accepted modern international law and usage. Secondly, beginning with her intercourse with Western countries, China has been bound by numerous unequal treaties by which foreign Powers have imposed numerous restrictions upon her territorial sovereignty. Since the Nationalist regime came into power, various measures, including revision of treaties, have been taken to terminate some of the notorious restrictions upon Chinese sovereignty, and considerable success has been achieved. And lastly, inasmuch as China's intimate contact with Western countries has existed for less than a century, in regard to many phases of international law no definite attitude of the Chinese government can be found.

The subject of this study was originally suggested as a doctoral dissertation by the late Professor James W. Garner of the University of Illinois. Begun in June, 1937, under his supervision, the study owes much to his ever-generous advice and constant inspiration. For the courtesy and generosity of the following scholars who have carefully examined the manuscript and offered valuable criticisms, I wish to express my sincere thanks: Professor Clarence A. Berdahl who acted as my adviser following the death of Professor Garner,

Dr. Valentine Jobst III, and Dr. Robert L. Blair of the University of Illinois; and Professor Quincy Wright of the University of Chicago. Special acknowledgement is also due to Professors John A. Fairlie, John M. Mathews, Merlin H. Hunter, Dr. Charles B. Hagan, Miss Nellie M. Signor, and Miss Angelina R. Pietrangeli, all of the University of Illinois; and to the librarians of the University of Illinois, University of Chicago, North Western University, Library of Congress, and Yale University. I am also deeply grateful to my wife for her constant encouragement.

Finally, I am particularly indebted to the Chairman of the Institute of Pacific Relations, Professor Philip C. Jessup of Columbia University, and to the Institute's Research Secretary, Mr. W. L. Holland, both for commenting on the manuscript and for making possible the publication of the book. Although the book is published under the Institute's auspices, it must be emphasized that neither the Institute as a whole nor any of its National Councils accept responsibility for statements of fact or opinion contained herein. For these I am solely responsible.

L. TUNG.

Yale University
New Haven
September, 1939

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CHAPTER I

JURISDICTION OVER TERRITORY

I. Territorial Domain

In General

THE TERRITORIAL DOMAIN of a State is the definite portion of the space of the globe within which that State exercises supreme authority. The territory of the Republic of China, as prescribed by the present Provisional Constitution,[1] consists of the Provinces, Mongolia, and Tibet,[2] as political or administrative divisions. To classify geographically, the Chinese territory comprises land within the boundary limits, national and territorial waters, air domain above its territory, and the sub-soil beneath its territory. Several component parts of the Chinese territory, concerning which some sort of attitude on the part of the Chinese government can be found, are to be discussed.

National Waters

National waters consist of rivers, lakes, canals, ports, and the like, which lie wholly within the boundaries of one and the same State.[3] In China, the Yangtze River,[4] the Tung-ting Lake, the Grand Canal, and the Port of Shanghai are examples. Theory and practice agree upon the rule that States have sole jurisdiction over their respective national waters, in which no foreign ships may navigate without express authorization in laws or treaties.[5]

[1] The Provisional Constitution was adopted at the fourth plenary session of the National People's Convention on May 12, 1931, and promulgated by the National Government on June 1, 1931. For its text, see *The Collected Laws of the Chinese Republic*, Commercial Press, 1936 (hereafter cited as *C L.C R./2*), Vol. 1, pp. 7-9

[2] See Art. 1. The special status of Mongolia and Tibet lies not only in their autonomous administration but also in their power of dealing with foreign nations, such as in the conclusion of treaties.

[3] Territorial waters consist of the waters contained in a certain zone or belt, which surrounds a State and thus includes a part of the waters in some of its bays, gulfs, and straits. For the distinction between territorial and national waters, see L. Oppenheim, *International Law*, Vol. 1, p. 357.

[4] The word 'Yangtze' was sometimes spelled as 'Yangtsze' in early laws and treaties. In several places, the Yangtze River was called Great River or Yangtsze Kiang.

[5] Grotius' teaching of innocent passage through rivers has evidently not been acted upon by the nations today. See Hugo Grotius, *De jure belli ac pacis, libri tres* (Whewell's edition), Vol. 1, pp. 242-247.

The Treaty of Peace, Friendship, and Commerce between Great Britain and China, signed at Tientsin, June 26, 1858,[6] was the first treaty which authorized foreign ships to navigate in the Yangtze River, Article X of that Treaty providing:

"British merchant ships shall have authority to trade upon the Great River (Yang-tsze). The Upper and Lower Valley of the river being, however, disturbed by outlaws, no port shall be for the present open to trade, with the exception of Chinkiang, which shall be opened in a year from the date of the signing of this Treaty

"So soon as peace shall have been restored, British vessels shall also be admitted to trade at such ports as far as Hankow, not exceeding 3 in number, as the British Minister, after consultation with the Chinese Secretary of State, may determine shall be ports of entry and discharge."

Later, other national waterways were, one after another, opened to foreign navigation; and, by the operation of the most-favored-nation treatment, all nations have become entitled to the same right.[7] For example, the Treaty of Friendship, Commerce, and Navigation between Sweden and China, signed at Peking, July 2, 1908,[8] provides:

"Swedish merchant vessels may proceed to all the Treaty ports of China already opened or which may hereafter be opened, for the transportation of merchandise and for purposes of trade. They may also proceed to the inland waters in China which foreign merchant vessels are at liberty to navigate, and to the ports of call along the rivers for the purpose of landing and shipping passengers and goods In all these matters they shall be subject to the Rules and Regulations concluded by China with other foreign powers."[9]

Besides separate rules relating to the navigation in different inland waterways,[10] several general regulations were issued by the Chinese government governing inland steam navigation, with special atten-

[6] Hertslet, Vol 1, No 6

[7] For a reference-manual to the treaties, conventions, laws, and other fundamental acts relating to foreign navigation of the Chinese inland waterways, see P M Ogilvie, *International Waterways*, pp 354-375

[8] MacMurray, Vol. 1, No 1908/11

[9] Art. VI, Par 1.

[10] See, for example, Regulations governing Trade on the Yangtsze Kiang, August, 1898 (Hertslet, Vol 2, No 139), West River Regulations, July 30, 1904 (MacMurray, Vol. 1, No 1904/3); Memorandum of Agreement concerning the Provisional Sungari River Trade Regulations, the Provisional Regulations of the Harbin River Customs, the Sansing Customs, and the Lahasusu Customs Barrier, August 8, 1910 (*Ibid.*, Vol. 1, No. 1910/3); Agreement between International and China and Regulations for the Liao River and Bar Conservancy Board, July 9, 1914 (MacMurray, Vol. 1, No. 1914/6); Regulations relating to the Trade in the Yangtze River, promulgated in 1862 and finally revised in 1933 (*C L.C.R* /2, Vol. 2, pp 1275-1277). For a brief historical narration of the Yangtze navigation, see A. J. Toynbee, *Survey of International Affairs*, 1926, pp. 303-307.

tion to registration and revenue. On July 28, 1898, the Tsung-li Yamen promulgated the Regulations relative to Inland Steam Navigation,[11] of which the following are the important points:

"1. The inland waters of China are hereby opened to all such steamers, native or foreign, as are specially registered for that trade at the Treaty Ports. They may proceed to and fro at will under the following Regulations but they must confine their trade to the inland waters and must not proceed to places out of Chinese territory. The expression 'inland waters' is used with similar meaning to that given for places in the interior (nei ti) in Article IV of the Chefoo Convention.[12]

"2. Trading steamers, native or foreign, not being vessels of sea-going type whether plying only in the waters of a Treaty Port or going thence inland are to be registered at the custom house and there take out papers showing respectively the owner's name and residence, name and type of steamer, number of crew, &c., in addition to whatever national papers they are allowed or required by law to carry; such Customs papers are to be renewed annually, and are to be surrendered on change of ownership or when the vessel ceases to ply. The fee for the first issue of Customs papers will be 10 taels, and for each renewal 2 taels.

"3. Such registered steamers may ply freely within the waters of the port without reporting their movements to the Customs; but if they go inland they must report both departure and return. No unregistered steamer will be allowed to ply inland.

"4. As regards exhibition of lights, prevention of collision, shipping of crews, and inspection of boilers and machinery, &c., all such steamers are to observe the rules in force at the port they belong to. These rules will be published by the Customs and printed on the vessel's Customs papers." [13]

The second part of the Regulations and the Supplementary Rules under the Inland Steam Navigation Regulations, promulgated in September, 1898,[14] deal with revenue in detail. These Regulations are applicable to steamships of all countries navigating in Chinese inland waterways, and subject to changes whenever necessary. The Treaty between China and the United States respecting Commercial Relations, etc., signed at Shanghai, October 8, 1903,[15] for example, provides:

"The Chinese Government having in 1898 opened the navigable inland waters of the Empire to commerce by all steam vessels, native or foreign, that

[11] Hertslet, Vol. 2, No. 138.

[12] Here Article IV of the Chefoo Convention should be Section III, Clause 4. See Hertslet, Vol. 1, p. 79.

[13] Hertslet, Vol. 2, p. 721.

[14] *Ibid.*, Vol. 2, No. 140.

[15] *Ibid.*, Vol. 1, No. 100.

may be specially registered for the purpose, for the conveyance of passengers and lawful merchandise—citizens, firms, and corporations of the United States may engage in such commerce on equal terms with those granted to subjects of any foreign Power.

"In case either Party hereto considers it advantageous at any time that the Rules and Regulations then in existence for such commerce be altered or amended, the Chinese Government agrees to consider amicably and to adopt such modifications thereof as are found necessary for trade and for the benefit of China." [16]

The above Regulations were amended on September 5, 1902, when the Treaty between Great Britain and China respecting Commercial Relations, etc., was signed at Shanghai.[17] Article X of the Treaty provided that the former Regulations had been found in some respects inconvenient in operation and that the two Contracting Parties mutually agreed to amend them. Ten additional rules concerning navigation of British ships in Chinese inland waterways were annexed to this Treaty in supplement to the Inland Steam Navigation Regulations of July and September, 1898, which were untouched and remain in force and effect.[18] In the Supplementary Treaty of Commerce and Navigation between Japan and China, signed at Shanghai, October 8, 1903,[19] the same additional rules were annexed.[20]

The right of foreign warships to navigate in the Chinese national waterways was first authorized by the Sino-British Treaty of 1858,[21] and later was extended to nations other than Great Britain.[22] It should be emphasized, however, that all foreign ships are prohibited from visiting along the national waterways temporarily occupied by rebels or robbers.[23]

In recent years, the Chinese government has inclined to reserve inland navigation for nationals only. Thus the following clause was included in the Treaty of Comity and Commerce between

[16] Art. XII, Pars. 1, 2.
[17] Hertslet, Vol. 1, No. 28.
[18] See *ibid.*, Vol. 1, No. 28, Annex C.
[19] MacMurray, Vol. 1, No. 1903/4.
[20] *Ibid.*, Vol. 1, pp. 415-417.
[21] See Art. LII.
[22] In this respect, the opinions of the Governments of China and other Treaty Powers are not unanimous. See *U.S. For. Rel.*, 1903, pp. 85-90. For details on the privileges of warships in the Chinese waters, see *infra*, pp. 44-47.
[23] See, for example, Art. II, Par. 2 of the Treaty of Friendship and Commerce between China and the Netherlands, signed at Tientsin, October 6, 1863 (Hertslet, Vol. 1, No. 70); Art. XLIX of the Treaty of Amity, Commerce, and Navigation between China and Spain, signed at Tientsin, October 10, 1864 (*Ibid.*, Vol. 1, No. 91).

China and Czechoslovakia, signed at Nanking, February 12, 1930:[24]

"The inland and coastwise navigation in the territory of either of the High Contracting Parties shall be closed to the nationals of the other and their vessels, without prejudice to the stipulations of international treaties relating to international rivers." [25]

A similar provision is found in the Treaty of Friendship, Commerce, and Navigation between China and Poland, signed at Nanking, September 18, 1929.[26]

In connection with inland navigation, the status of ports is too important to be neglected. In China, there are three kinds of ports: open ports, ports of call, and non-open ports. Open ports are such places as are opened for foreign trade either by treaties or by the Chinese government voluntarily. Hence open ports are again divided into treaty ports and voluntarily opened ports. A treaty port may be a port in the ordinary sense of the word, or it may be an inland city or a mart many miles away from the coast. By the Treaty of Peace, Friendship, Commerce, Indemnity, etc., between Great Britain and China, signed at Nanking, August 29, 1842,[27] Canton, Amoy, Foochow, Ningpo, and Shanghai were opened for foreign trade. Article II of this Treaty reads:

"His Majesty the Emperor of China agrees that British subjects, with their families and establishments, shall be allowed to reside, for the purpose of carrying on their mercantile pursuits, without molestation or restraint, at the cities and towns of Canton, Amoy, Foochowfoo, Ningpo, and Shanghai."

By other treaties later concluded between China and other nations, many other places have been gradually opened as treaty ports.[28] The limits of the treaty ports have never been precisely defined in the treaties. The ministers of foreign powers in Peking held the opinion that the word "t'ung shang k'ou ngan" (treaty port) comprised the port, the city of the port, and any road or waterway connecting these two. To this definition the Chinese government

[24] *League of Nations Treaty Series*, Vol. 110 (1931), pp. 286-306.
[25] Art. XV.
[26] *League of Nations Treaty Series*, Vol. 120 (1932), pp. 360-367. See Art. XIV.
[27] Hertslet, Vol. 1, No. 1.
[28] See, for example, Arts. X and XI of the Treaty of Peace, Friendship, and Commerce, between Great Britain and China, June 26, 1858; Art. XII, Par. 3 of the Treaty between China and the United States respecting Commercial Relations, etc., October 8, 1903. For the historical development of treaty ports in China, see Tai En-sai, *Treaty Ports in China* (1918).

has never agreed. On the other hand, it has maintained that the limits of a treaty port should be confined to the port itself.[29]

In addition to treaty ports there are in China a number of places voluntarily opened by the Chinese government for foreign trade. By the Presidential Mandate of January 8, 1914,[30] for example, certain ports were voluntarily opened under conditions different from treaty ports. As an illustration, the Mandate is reproduced as follows:

"Since the removal of trade restrictions and the entrance of China into relations with the rest of the world, many important ports on the sea and on the Yangtze River have been opened to trade, thereby resulting in benefit to all. The ports opened to trade have, however, all been in the south and east, and the regions to the north and west of the Great Wall have been neglected, so that trade has languished and progress has been arrested. If something is not done soon to open up these regions to trade, how can we expect that any benefits can ever be gained therefrom?

"The premier, Hsiung Hsi-ling, and others have recommended the voluntary opening to trade of the following places: Kuei Hua Ch'eng, Kalgan, Dolonor, Ch'ih Feng, T'ao Nan, and Lung K'ou (the last being a port in Huang Hsien, Shantung). It was also recommended that Hu Lu Tao in Fengtien, which it was decided to open during the last year of the Ch'ing Dynasty (1911) be opened to trade at the same time.

"The recommendations of the premier and others were certainly made with a view to the improvement of local conditions and the stimulation of industry, and are approved. The premier will confer with the cabinet ministers concerned and have immediate preparations made for the opening of the ports.

"It should be noted that this voluntary opening should be distinguished from opening by treaty. Careful regulations will be drawn up and submitted for the inspection of the president, after which they will be published, that all may respect them.

"The president hopes that this step will result in the extension of trade and the strengthening of national sovereignty, and that later, after the further extension of railways, and after Mongolia has been gradually opened up, the people in the interior may become more enlightened and regions now poor may become wealthy and populous."

Evidently the Chinese government, in opening these ports, had as its main purpose the promotion of trade with foreign nations. In these voluntarily opened ports, the local authorities have retained the power of control over the municipal administration and police within the international settlements. As to the applicability of

[29] See *U. S. For. Rel.*, 1908, pp. 143-145; V. K. Wellington Koo, *The Status of Aliens in China*, pp. 249-250.

[30] MacMurray, Vol. 2, No. 1914/1.

the stipulations for treaty ports to voluntarily opened ports, the opinions of the Chinese authorities and the foreign nations again differ: the former held that such applicability was unnecessary, while the latter maintained the contrary view. In the case of the Santuao Wharfage Dues in 1899, the Chinese government tried to levy, in addition to treaty tariff dues, wharfage dues at the rate of two per cent in Santuao, a voluntarily opened port in Fukien province. The foreign ministers at Peking advocated that the restriction of not levying more than treaty tariff dues in the treaty ports was applicable to the voluntarily opened ports, and contested the Chinese power of levying wharfage dues in Santuao. The following is an extract from the instruction of the British government to its minister at Peking:

"No distinction can be admitted by Her Majesty's government between ports opened by treaty or arrangement with a foreign power and those declared open by the initiative of the Chinese government." [31]

Notwithstanding the foreign contention in this respect, practice shows a clear distinction between treaty ports and voluntarily opened ports, especially in municipal administration and police in the international settlements of such ports.

Ports of call are places along the national waterways, where foreign ships are permitted to carry on a limited traffic. The status of the ports of call can be explicitly shown by the Agreement between Great Britain and China for the Settlement of the Yunnan Case, Official Intercourse, and Trade between the Two Countries, signed at Chefoo, September 13, 1876.[32] Section III of the Treaty provides:

"It is further proposed as a measure of compromise that at certain points on the shore of the Great River, namely, Ta-t'ung, and Ngan-Ching in the Province of An-Hui; Hu-K'ou, in Kiangsi; Wu-suëh, Lu-chi-k'ou, and Sha-shih in Hu-Kuang; these being all places of trade in the interior, at which, as they are not open ports, foreign merchants are not legally authorized to land or ship goods; steamers shall be allowed to touch for the purpose of landing or shipping passengers or goods, but in all instances by means of native boats only, and subject to the regulations in force affecting native trade.

"Produce accompanied by a half-duty certificate may be shipped at such points by the steamers, but may not be landed by them for sale. And at all such points, except in the case of imports accompanied by a transit duty

[31] *British Parliamentary Papers*, China, No. 1 (1900), p. 276. See also *ibid.*, pp. 251, 406.
[32] Hertslet, Vol. 1, No. 12.

certificate, or exports similarly certified, which will be severally passed free of *li-kin* on exhibition of such certificates, *li-kin* will be duly collected on all goods whatever by the native authorities." [33]

Non-open ports are places other than open ports and ports of call. Foreign ships may enter open ports or ports of call within the limits of the rules and regulations in force,[34] but are prohibited from visiting non-open ports on pain of confiscation of both ships and cargo. For example, the Treaty of Commerce and Navigation between China and Japan, signed at Peking, July 21, 1896,[35] provides:

"Japanese vessels may touch for the purpose of landing and shipping passengers and merchandise in accordance with the existing Rules and Regulations concerning foreign trade there at all those places in China, which are now ports of call, namely, Ngan-ching, Ta-tung, Hu-kow, Wu-sueh, Lu-chi-kow and Woosung and such other places as may hereafter be made ports of call also. If any vessel should unlawfully enter ports other than open ports and ports of call in China or carry on clandestine trade along the coast or rivers, the vessel with her cargo shall be subject to confiscation by the Chinese government." [36]

However, this prohibition is not applicable to all cases. Foreign ships under *force majeure* may temporarily enter any Chinese port for refuge.[37]

Maritime Belt

The maritime belt of a State is that part of the marginal sea which is under the sovereignty of that State, with the exception of innocent passage of foreign ships.[38] Although the individual opinions of jurists and the practice of different States are at variance concerning the breadth of the maritime belt, the rule of three miles or one marine league measured from the low-water mark has been

[33] Art. 1, Pars. 4-5.

[34] See, for example, Art. VII of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, signed at Washington, December 14, 1899 (Hertslet, Vol. 1, No. 69); Art. VI, Par. 1 of the Treaty of Friendship, Commerce, and Navigation between Sweden and China, July 2, 1908; Art. XV, Pars. 2 and 3 of the Treaty of Friendship, Commerce, and Navigation between Poland and China, September 18, 1929; Art. XVI of the Treaty of Amity and Commerce between China and Czechoslovakia, February 12, 1930. For Regulations relating to the Quarantine in the Ports, promulgated by the Ministry of Health on June 28, 1930, see *C.L.C.R./2*, Vol. 2, pp. 1119-1124.

[35] Hertslet, Vol. 1, No. 64.

[36] Art. V.

[37] See *infra*, pp. 48-49.

[38] For the sway of the littoral State over its maritime belt, see P. Fauchille, *Traité de droit international public*, Vol. 1, Secs. 492-492(10).

generally recognized since the end of the eighteenth century.[39] The subject of territorial waters was one of the three topics discussed at the First Conference for the Codification of International Law, held at The Hague in 1930. With regard to the breadth of the maritime belt, the Basis of Discussion No. 3 states:

"The breadth of the territorial waters under the sovereignty of the coastal States is three nautical miles." [40]

The Chinese government has adhered to this rule. At the thirteenth meeting of the Second Committee (Committee on Territorial Waters) of the Conference, held on April 3, 1930, Mr. William Hsieh, in behalf of the Chinese delegation, made the following statement:

"The Chinese delegation accepts the Basis of Discussion No. 3 in principle." [41]

As a matter of international comity, the littoral States are generally allowed, either by municipal legislation or by treaties, to enforce their revenue or sanitary laws beyond the limit of the maritime belt. By the Treaty of Friendship, Commerce, and Navigation between China and Mexico, 1899, a distance of three marine leagues was agreed upon by the two countries for the enforcement of customs regulations. Article XI of the Treaty reads in part:

"The two Contracting Parties agree upon considering a distance of 3 marine leagues, measured from the line of low tide, as the limit of their territorial waters for everything relating to the vigilance and enforcement of the Custom-house Regulations and the necessary measures for the prevention of smuggling." [42]

In May, 1931, the Ministry of Communications notified the Shanghai Navigation Association that the limit of the Chinese maritime belt was three miles, but that of enforcing customs regulations for the prevention of smuggling was extended to twelve miles.[43]

[39] Bynkershoek's rule of the range of cannon-shot, approximately three miles at the eighth decade of the eighteenth century, has been disputed on account of the fact that such range is rapidly increasing.

[40] League Docs. C. 74. M. 39, 1929. V., p. 33; C. 351 (b); M. 145 (b). 1930. V., p. 179.

[41] League Doc. 351 (b). M. 145 (b). 1930. V., p. 124. Besides China, France, Great Britain and the British Dominions, the United States, Germany, Japan, Belgium, Poland, and the Netherlands held the three-mile limit; Italy, Turkey, Spain, Brazil, Persia, and Yugoslavia were among the States claiming six-mile limit at the Conference.

[42] Par. 5.

[43] See *World Daily News* (issued at Peiping), May 10, 1931.

As to fisheries within the maritime belt, international practice permits the littoral State to reserve this right for its own nationals.[44] The Chinese government follows this general practice, as evidenced by the Regulations relating to the functions of the Cruisers under the Control of the Bureau of Maritime Fishery, promulgated by the Ministry of Industry, March 2, 1933.[45] Article 9 of the Regulations provides:

"Whenever foreign ships fish in the Chinese maritime belt without previous permission, the cruisers shall immediately stop them and report to the Ministry of Industry through the Bureau of the Maritime Fishery."

In the absence of special treaties to the contrary, a littoral State may exclude foreign ships from coasting trade or cabotage.[46] The Chinese attitude in this respect is inconclusive. In most of the early treaties concluded between China and other nations, the right of cabotage was granted to foreign ships. The Treaty of Amity, Commerce, and Navigation between China and Spain, 1864, for example, provides:

"It is lawful for Spanish vessels to carry Chinese products along the coast, from one port to another open to trade, on paying the tariff duties at the place of embarkation, and those of the coasting trade (the amount of which will be half the tariff dues) at the port where the discharge takes place.

"If a Spanish merchant should, within the term of one year, re-export to a Chinese port on the coast, Chinese products proceeding from some other port on the same, he shall be entitled to a certificate showing the amount of coasting trade dues paid (which is half that of the tariff duties) and shall not be required to pay any export duties at the time of loading; but at the time of unloading the said goods at the port of debarkation, he must pay again half the amount of the tariff duty."[47]

The only exceptional provision of the early treaties regarding the right of cabotage is found in Article XI of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, 1899:

"The merchant-vessels of each of the Contracting Parties shall be at liberty to frequent the ports of the other open to foreign commerce, or that may hereafter be opened.

"It is, however, agreed that this concession does not extend to the coasting trade, granted only to the national vessels in the territory of each of the

[44] For details, see Gilbert Gidel, *Le droit international public de la mer, le temps de paix*, Vol. 3, pp. 222-325.

[45] *C.L.C.R./2*, Vol. 6, pp. 3395-3396.

[46] See Pradier-Fodéré, *Traité de droit international public, européen et américain*, Vol. 5, Secs. 2441-2442.

[47] Art. XLIV.

Contracting Parties. But if one of them should permit it, wholly or in part, to any nation or nations, the other Party shall have the right to claim the same concessions or favors for its citizens or subjects, provided said Contracting Party is willing, on its part, to grant reciprocity in all its claims on this point." [48]

In recent treaties, the Chinese government is definitely tending to reserve coasting trade to its own nationals. The Sino-Polish Treaty of 1929, for example, provides:

"The two Contracting Parties reserve the right to engage in the coasting trade and in internal navigation for their respective nationals." [49]

Air Domain

Before the twentieth century, there was no customary law on the juridical nature of air space. With the development of aerial navigation, however, a wide diversity of views toward aerial jurisdiction has been put forth by the jurists. These views can be summarized as follows: (1) complete freedom of air space, (2) a lower zone of territorial air space, (3) air space entirely within the sovereignty of the subjacent State, and (4) air space within the sovereignty of the subjacent State subject to a servitude of innocent passage of foreign civil airplanes.[50]

The first international legislation on aerial navigation was brought about by the Convention relating to the Regulation of Aerial Navigation, signed at Paris, October 13, 1919,[51] of which China is a signatory. With regard to the jurisdiction over air space, the Convention provides:

"The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory.

"For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto." [52]

Freedom of innocent passage under certain conditions is permissible, according to this Convention:

"Each Contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting

[48] Pars. 1, 2.

[49] Art. XIV. See also Art. XV of the Treaty of Amity and Commerce between China and Czechoslovakia, February 12, 1930.

[50] For the various views of publicists, see J. W. Garner, *Recent Developments in International Law*, Lecture IV; H. D. Hazeltine, *The Law of the Air*, Lecture I.

[51] For its text, see *League of Nations Treaty Series*, Vol. 11 (1922), pp. 174-208.

[52] Art. 1.

States, provided that the conditions laid down in the present Convention are observed.

"Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality." [53]

Since the inauguration of the Nationalist regime, aerial navigation has been much emphasized by China, and various devices have been launched for its progressive development.[54] The Chinese government takes the attitude that the air space above China's territorial domain is within her complete jurisdiction. The conditions of innocent passage are prescribed by the Temporary Regulations relating to the Temporary and Special Permission of Foreign Airplanes Flying Over the Chinese Territory, promulgated by the Executive *Yuan* on January 19, 1935.[55] The essentials of the Regulations can be summarized as follows:

1. Foreign airplanes flying over or landing on Chinese territory must get permission from the Chinese government one month before, through the foreign legations in China.[56]

2. Foreign airplanes flying over Chinese territory are prohibited to pass through the air space above the forbidden zone or fortifications, or to perform military manœuvre and whatever action which might be detrimental to China's national defence. When they land on Chinese territory, they are subject to investigation by the Chinese government.[57]

3. Foreign airplanes must not bring in forbidden goods, including munitions, arms, postal articles, and cameras. They must not drop down anything from the air to Chinese territory.[58]

[53] Art. 2. For the courses of passage to be followed, see Arts. 3, 4, 15. The Convention also provides that the nationality of aircraft is determined by its ownership and registration, registration being restricted to nationals of the State or to incorporated national companies (Arts 5-10).

[54] See, for example, Section on Communications, No. 7 of the Political Program of the National Government during the Period of Political Tutelage, enacted by the second plenary session of the Central Executive Committee of the Nationalist Party in July, 1929 (*C.L.C.R.*/2, Vol. 1, pp. 10-14); Regulations relating to the Training of Aviation Policemen, promulgated by the Ministry of Interior (*Ibid.*, Vol. 2, p. 832); Rules relating to the Organization of the Bureau of Air Navigation of the Ministry of War, promulgated by the National Government on November 21, 1928 (*Ibid.*, Vol. 3, pp. 1364-1365).

[55] *C.L.C.R.*/2, Vol. 2, p. 1273.

[56] Art. 2.

[57] Arts. 3, 8.

[58] Art. 9. These Regulations have no connection with the International Convention of Aerial Navigation, 1919, which has not yet been ratified by the Chinese government.

The Chinese attitude toward jurisdiction over airplanes can be traced from the provision of the Criminal Code, promulgated by the National Government on January 1, 1935.[59] Article 3 of the Code stipulates that crimes committed in Chinese airplanes outside of Chinese territory should be treated as if they were committed within Chinese territory. Evidently the Chinese government considers its airplanes as floating portions of its territory.

Acquisition and Loss of State Territory

No unanimity exists among writers of international law on the modes of acquiring and losing State territory. Acquisition through occupation, accretion, prescription, and cession, and loss through dereliction, operation of nature, prescription, and revolt followed by cession are commonly recognized.[60] Conquest as a mode of acquiring State territory has ever been disputed by jurists, and is repudiated by the Covenant of the League of Nations and the Pact of Paris.[61] The lease of a certain part of a State territory merely imposes upon that State a restriction on the exercise of its territorial sovereignty over that territory within the period of lease, and, legally speaking, it has no relation to acquisition or loss of State territory at all.[62]

An examination of Chinese modern history shows no essential difference between the Chinese conception and the general rule of international law with regard to the modes of acquiring and losing State territory. As a matter of fact, China has not acquired any territory in her recent history; but she has lost much territory through cession, since her intercourse with modern States.[63] In this connection, the Chinese government has acquiesced, at least on one occasion, in the intervention of third Powers in her cession of

[59] *C.L.C.R./2*, Vol. 1, pp. 137-155.

[60] See L. Oppenheim, *op. cit.*, Vol. 1, pp. 428, 429, 458.

[61] P. Fiore, in his *International Law Codified and Its Legal Sanction or the Legal Organization of the Society of Nations*, writes:

"Conquest, which consists in the occupation by force of the territory of another state, cannot *per se* be considered a legally valid title to the occupied territory. It must always be considered as illegal according to modern international law, whatever its purpose may be." (P. 430, Sec. 1083.)

See also Despagnet, *Cours de droit international public*, Secs. 387-390.

[62] See *infra*, pp. 19-24.

[63] For example, by Art. III of the Treaty of Peace, Friendship, Commerce, Indemnity, etc., between Great Britain and China, August 29, 1842, China ceded Hongkong to Great Britain; by Art. II of the Treaty of Peace btween China and Japan, signed at Shimonoseki, April 17, 1895 (Hertslet, Vol. 1, No. 62), Formosa and the Pescadores Group were ceded to Japan.

territory to other nations.[64] In respect to conquest as a mode of acquiring State territory, the Chinese attitude has been clearly expressed in the Manchurian incident.[65] Eight years being passed, the Chinese government still upholds the policy of non-recognition of Manchukuo, a puppet State set up by Japanese force.[66] This attitude toward military conquest is further evidenced by the participation of the Chinese government in the collective sanctions against Italy during the latter's invasion of Ethiopia.[67]

II. Boundaries

Demarcation of Boundaries

The boundaries of a State mark the limits of its territorial domain.[68] These boundaries may be natural or artificial. Natural boundaries usually consist of mountains, rivers, forests, deserts, the open sea, marshes, territorial waters, and the like. Artificial boundaries are generally marked by various landmarks, such as stones, posts, walls, trenches, canals, and the like.[69]

An examination of the Chinese boundary treaties shows no essential difference between the Chinese and the general international practices with regard to the rules of delimiting boundaries. Taking the general rule of mid-channel or *thalweg* as the boundary line of a navigable river as an example,[70] the Treaty of Peace between China and Japan, 1895, provides:

"The places above named are included in the ceded territory. When the line reaches the River Liao at Yinkou it follows the course of that stream to its mouth, where it terminates. The mid-channel of the River Liao shall be taken as the line of demarcation." [71]

[64] See *infra*, p. 184.

[65] See, for example, the statement made by Dr. Lo Wen-kan, Chinese foreign minister, on August 29, 1932, immediately after an address delivered by Count Uchida, Japanese foreign minister, in the House of Peers on August 25. *League of Nations Official Journal*, Special Supplement No. 102, p. 39.

[66] As a member of the League of Nations, China is also bound by its decision of non-recognition of Manchukuo. See Assembly Resolution of March 11, 1932, and the Assembly Report of February 24, 1933.

[67] See *infra*, pp. 184-185.

[68] For the importance of fixed boundaries, see H. Lauterpacht, *Annual Digest of Public International Law Cases*, 1929-1930, Case No. 5.

[69] For details, see A. S. Hershey, *The Essentials of International Public Law and Organization*, pp. 269-270.

[70] See J. W. Garner, "The Doctrine of the *Thalweg* as a Rule of International Law," *Am. Jour. Int. Law*, Vol. 29 (1935), pp. 309-310.

[71] Art. II, No. (a), Par. 2.

An outstanding instance of the Chinese practice of the demarcation of natural boundaries is found in the following clause of the Protocol of Conference between Russia and China Defining the Boundary between the Two Countries, signed at Tchuguchak, September 25/ October 7, 1864:[72]

"For placing the marks the following rule shall be observed: where the boundary runs along high mountains, the summits of the mountains are there to be taken as the boundary line; and where it runs along large rivers, there the banks of the rivers are to serve as the line of frontier; at places where the boundary runs across mountains and rivers, new boundary marks are to be placed at all such places. In general, along the whole frontier the direction of the course of waters is to be taken into consideration when placing the boundary marks, and these marks are to be erected according to the nature of the locality. If, for instance, there is no pass through the mountains and consequently the placing of boundary marks would at such points be attended with difficulty, then the range of mountains and the course of flowing waters must be taken as the basis for the boundary line. In placing the marks in a valley, 30 fathoms (20 Chinese fathoms) must be left as intermediate ground." [73]

The diversion of the course of a river located between the two countries was prohibited. Article VIII of the same Treaty stipulates:

"After the boundary marks shall have been erected by them along the whole line of frontier now determined between the two Empires, should it anywhere appear that the source of a river is situated within Chinese territory, and its course run within the confines of the Russian Empire, in such case the Chinese Empire must not alter the former bed of the river nor dam its course; and so conversely, should the source of the river be situated in Russian territory, and its course run within Chinese limits, the Russian Empire must not alter its former bed or dam its course."

Artificial boundaries generally follow astronomical or mathematical lines based on latitude or longitude. China shows no exception to this general practice. For example, in the Agreement between Great Britain and China, Modifying the Convention of March 1, 1894, relative to Burmah and Tibet, signed at Peking, February 4, 1897,[74] the boundaries from the Shweli to the Mekong were defined in the following manner:

"From the junction of the Namwan and Shweli the frontier shall follow the northern boundary of the State of North Hsinwi, as at present constituted, to the Salween, leaving to China the loop of the Shweli River, and almost the whole of Wanting, Mong-ko, and Mong-ka.

[72] Hertslet, Vol. 1, No. 83.
[73] Art. VI, Par. 3.
[74] MacMurray, Vol. 1, No. 1897/1.

"Starting from the point where the Shweli turns northward near Namswan, *i.e.* from its junction with the Namyang, the frontier shall ascend this latter stream to its source in the Mong-ko Hills, in about latitude 24°7′ and longitude 98°15′, thence continue along a wooded spur to the Salween at its junction with the Namoi stream The line shall then ascend the Salween till it meets the northwest boundary of Kokang, and shall continue along the eastern frontier of Kokang till it meets the Kunlong circle, leaving the whole circle of Kunlong to Great Britain.

"The frontier shall then follow the course of the river forming the boundary between Somu, which belongs to Great Britain, and Mêng Ting, which belongs to China. It shall still continue to follow the frontier between those two districts, which is locally well known, to where it leaves the aforesaid river and ascends the hills, and shall then follow the line of water parting between the tributaries of the Salween and the Mekong Rivers, from about longitude 99° east of Greenwich (17°30′ west of Peking), and latitude 23°20′, to a point about longitude 99°40′ east of Greenwich (16°50′ west of Peking) and latitude 23°, leaving to China the Tsawbwaships of Kêng Ma, Mengtung, and Mengko

"At the last named point of longitude and latitude the line strikes a very lofty mountain range, called Kong Ming-Shan, which it shall follow in a southerly direction to about longitude 99°30′ east of Greenwich (17° west of Peking), and latitude 22°30′, leaving to China the district of Chen-pien T'ing Then, descending the western slope of the hills to the Namka River, it will follow the course of that river for about 10 minutes of latitude, leaving Munglem to China and Manglun to Great Britain

"The frontier shall then follow the boundary between Munglem and Kiang Tong, which is locally well-known, diverging from the Namka River a little to the north of latitude 22°, in a direction somewhat south of east, and generally following the crest of the hills till it strikes the Namlam River in about latitude 21°45′ and longitude 100° east of Greenwich (16°30′ west of Peking)

"It shall then follow the boundary between Kiang Tong and Kiang Hung, which is generally formed by the Namlam River, with the exception of a small strip of territory belonging to Kiang Hung, which lies to the west of that river, just south of the last-named parallel of latitude On reaching the boundary of Western Kyaing Chaing, in about latitude 21°27′ and longitude 100°12′ east of Greenwich (16°18′ west of Peking), the frontier shall follow the boundary between that district and Kiang Hung until it reaches the Mekong River" [75]

Beginning with the inauguration of the Nationalist regime, the Chinese government has felt the extreme importance of the delimitation of boundaries. In the Political Program of the National Government during the Period of Political Tutelage, 1929,[76] the following points relating to boundaries were laid down:

[75] Art III

[76] *C L C R*/2, Vol 1, pp 10-14

1. To establish a committee to study boundary treaties;
2. To make boundary maps;
3. To ascertain the breadth of maritime belt and that of straits; and
4. To delimit the unascertained boundaries.

The demarcation of boundaries is by no means a simple and easy undertaking. Differing opinions on the part of the Contracting Parties frequently arise, and sometimes it takes a long time to reach an agreement. In most cases of the demarcation of boundaries between China and other nations, a joint commission was constituted for practical investigation and demarcation, especially for matters of detail.[77] The Chinese government has emphasized the principle of equality and reciprocity as the fundamental basis of the delimitation of boundaries.[78]

Territorial Propinquity

In connection with boundaries, the so-called principle of territorial propinquity is, for convenience, to be discussed here. The doctrine that territorial propinquity creates special relations between countries is based solely upon national expediency. Theory and practice have never recognized it as a rule of international law.

During the latter part of the World War, there came an understanding in relation to territorial propinquity between the United States and Japan, embodied in identical notes exchanged on November 2, 1917, between Viscount Ishii, Japanese special envoy to the United States, and Mr. Lansing, American Secretary of State.[79] The Note signed by Mr. Lansing reads in part:

"The Governments of the United States and Japan recognize that territorial propinquity creates special relations between countries, and, consequently, the Government of the United States recognizes that Japan has special interests in China, particularly in the part to which her possessions are contiguous.

[77] A recent instance was the Yunnan-Burmah Commission, provided for under the Exchange of Notes of April 9, 1935, between Great Britain and China (*League of Nations Treaty Series*, Vol. 163 (1935), pp. 178-183; *China Year Book*, 1935, pp. 148-149). The Commission was constituted on December 1, 1935, with two commissioners of each side and a neutral chairman. It was successful in that the disputed boundaries between Burmah and China had been delimited.

[78] See, for example, Art. VIII of the Agreement between Soviet Russia and China on General Principles for the Settlement of the Questions between the Two Countries, signed at Peking, May 31, 1924 (*Supplement to MacMurray's Treaties*, pp. 133-140).

[79] For correspondence on the Lansing-Ishii Agreement, see *U. S. For. Rel.*, 1917, pp. 258-274.

"The territorial sovereignty of China, nevertheless, remains unimpaired and the Government of the United States has every confidence in the repeated assurances of the Imperial Japanese Government that while geographical position gives Japan such special interests they have no desire to discriminate against the trade of other nations or to disregard the commercial rights heretofore granted by China in treaties with other powers.

"The Governments of the United States and Japan deny that they have any purpose to infringe in any way the independence or territorial integrity of China and they declare, furthermore, that they always adhere to the principle of the so-called 'Open Door' or equal opportunity for commerce and industry in China.

"Moreover, they mutually declare that they are opposed to the acquisition by any Government of any special rights or privileges that would affect the independence or territorial integrity of China or that would deny to the subjects or citizens of any country the full enjoyment of equal opportunity in the commerce and industry of China" [80]

The negotiation of this agreement, though of great concern to China, was carried on in such a way that the Chinese government was not consulted or even informed beforehand. The gist of the understanding consisted of the American recognition of Japan's special interests in China on the ground of territorial propinquity, which was flatly rejected by the Chinese government in a Declaration of November 12, 1917. The following is an extract from the Declaration:

"The principle adopted by the Chinese Government towards the friendly nations has always been one of justice and equality, and consequently the rights enjoyed by the friendly nations derived from the treaties have been consistently respected, and so even with the special relations between countries created by the fact of territorial contiguity, it is only in so far as they have already been provided for in her existing treaties. Hereafter the Chinese Government will still adhere to the principle hitherto adopted, and hereby it is again declared that the Chinese Government will not allow herself to be bound by any agreement entered into by other nations." [81]

Here the Chinese government emphasized that territorial propinquity could not create special relations between countries if not provided in existing treaties. The Lansing-Ishii Agreement became unpopular in the United States,[82] and was formally cancelled by an exchange of notes between Japan and the United States on April 14, 1923.[83]

[80] MacMurray, Vol. 2, pp. 1394-1395.
[81] *U S For. Rel.*, 1917, p. 270.
[82] *Ibid*, 1923, pp. 455-458.
[83] See *Supplement to MacMurray's Treaties*, p 130

III. Restrictions upon Territorial Sovereignty

In General

Although the right of territorial sovereignty is fundamental to the independence of a State, restrictions upon the exercise of such right through treaties are not uncommon in international practice.[84] This has been especially evident in the case of China since the middle of the nineteenth century. The most notorious restrictions on China's territorial sovereignty are the leased territories, concessions and settlements, spheres of influence or interest, and foreign armed forces and demilitarized zones.[85] The Chinese attitude toward such restrictions has naturally been antagonistic, and can be most authoritatively shown by the 'Questions for Readjustment' submitted by China to the Paris Peace Conference of 1919[86] and various statements made by the Chinese delegates at the Washington Conference, 1921-1922.

Leased Territories

The exaction of leased territories from China was begun by Germany. In November 1, 1897, two Roman Catholic missionaries of German nationality were murdered by a band of robbers in a village of the Shantung province. In spite of the prompt action of the Chinese government in apprehending and punishing those guilty of or responsible for the murder, Germany seized the

[84] There are divergent views concerning the application of the terminology and concept of the Roman Law of servitudes to the restrictions on the territorial sovereignty of a State. In order to avoid unnecessary confusion, the writer prefers not to use the term in the present discussion. For the divergent views on State servitudes, see J. B. Moore, *A Digest of International Law*, Vol. 1, Secs. 163-168; R. Phillimore, *Commentaries Upon International Law*, Vol. 1, Secs. 281-283; L Oppenheim, *op. cit.*, Vol 1, Secs. 203-208; A. S Hershey, *The Essentials of International Public Law and Organization*, Secs. 166-168; H. Taylor, *A Treatise On International Public Law*, Vol. 1, Sec. 245; J. Westlake, *International Law*, Vol. 1, p. 61; T. Twiss, *The Law of Nations Considered as Independent Political Communities*, Vol. 1, Sec. 245; Vattel, *The Law of Nations*, Vol. 1, Bk. 2, Ch. VII, Sec. 89; E. Nys, *Le droit international: les principes, les theories, les faits*, Vol. 2, pp. 271-279; A. W. Heffter, *Le droit international de l'Europe*, Sec. 43; W. E. Hall, *A Treatise on International Law*, Sec. 42; P. Labrousse, *Des servitudes en droit international public* (1911); H. D. Reid, *International Servitudes In Law and Practice* (1932); A. D. McNair, "So-called State Servitudes," *Brit. Yr. Bk. Int. Law*, Vol. 6 (1925), pp. 111-127; P. B. Potter, "The Doctrine of Servitudes in International Law," *Am. Jour. Int. Law*, Vol. 9 (1915), No. 3, pp. 627-641.

[85] Detailed discussion on such restrictions is not given here, because they have already been considered in several treatises. Extraterritoriality is discussed in the chapter "Jurisdiction over Persons".

[86] It is well known that China's cause was disregarded by the Powers at the Peace Conference, especially in respect to the Shantung Problem. Accordingly, there was no due consideration of the Chinese Memorandum for Readjustment.

opportunity by delivering to the Chinese government a list of demands, of which the lease of Kiaochow was the chief item. Under German naval pressure, the Chinese government was compelled to sign the Convention respecting the Lease of Kiaochow to Germany on March 6, 1898.[87] Article II of the Treaty reads:

"With the intention of meeting the legitimate desire of His Majesty the German Emperor, that Germany, like other Powers, should hold a place on the Chinese coast for the repair and equipment of her ships, for the storage of materials and provisions for the same, and for other arrangements connected therewith. His Majesty the Emperor of China cedes to Germany on lease, provisionally for ninety-nine years, both sides of the entrance to the Bay of Kiaochou. Germany engages to construct, at a suitable moment, on the territory thus ceded, fortifications for the protection of the buildings to be constructed there and of the entrance to the harbour."

Invoking the policy of the balance of power, other States immediately put demands on the Chinese government for lease of other places on the Chinese coast. Confronting an insurmountably difficult situation, China was constrained to accept such demands, and in 1898 the following places were leased to foreign States:

1. Kiaochow Bay to Germany for ninety-nine years (March 6).[88]
2. Port Arthur and Talien-wan to Russia for twenty-five years (March 27).[89]
3. Kuang-chou-wan to France for ninety-nine years (April 10).[90]
4. Kowloon to Great Britain for ninety-nine years (June 9).[91]
5. Weihaiwei to Great Britain "for so long a period as Port Arthur shall remain in the occupation of Russia" (July 1).[92]

While the measures and extent of control by the lessee States over the leased territories varied in different cases, the leases were all limited to a fixed term of years. From the provisions of the treaties affecting the leases, the leased places remained part of the Chinese

87 MacMurray, Vol. 1, No. 1898/4.

88 By the Convention respecting the Lease of Kiaochow to Germany between China and Germany, signed at Peking, March 6, 1898.

89 By the Agreement between China and Russia respecting the Lease of Port Arthur and Talien-wan, signed at Peking, March 27, 1898 (Hertslet, Vol. 1, No. 88). See also the Additional Agreement between China and Russia respecting the Boundaries of Port Arthur and Talien-wan, etc., signed at St. Petersburg, May 7, 1898 (*Ibid.*, No. 89).

90 By the Agreement between France and China in regard to A Concession to Build a Railway from Tongking to Yunnan, the Lease of Kuang-chou-wan, and the Organization of the Chinese Postal Service, signed at Peking, April 10, 1898 (MacMurray, Vol. 1, No. 1898/7).

91 By the Convention between Great Britain and China respecting An Extension of the Hongkong Territory, signed at Peking, June 9, 1898 (*Ibid.*, Vol. 1, No. 1898/11).

92 By the Convention between Great Britain and China for the Lease of Weihaiwei, signed at Peking, July 1, 1898 (*Ibid.*, Vol. 1, No. 1898/14).

territory. For example, the Agreement between China and Russia, respecting the Lease of Port Arthur and Talien-wan, March 27, 1898, provides:

"In order for the protection of the Russian fleet, and (to enable it) to have a secure base on the north coast of China, His Majesty the Emperor of China agrees to lease to Russia Port Arthur, Talien-wan, and the adjacent waters. But this lease is to be without prejudice to China's authority in that territory." [93]

In the leased territories, however, the exercise of China's territorial sovereignty has been strikingly restricted within the period of lease. Article IV of the same Treaty reads in part:

"Within the term fixed, in the territory leased to Russia, and in the adjacent waters, all movements of forces, whether naval or military, and the appointment of high officials to govern the districts, shall be entirely left to Russian officers, one man being made responsible, but he is not to have the title of Governor-General or Governor.

"No Chinese troops of any kind whatever are to be allowed to be stationed within this boundary. Chinese within the boundary may leave or remain at their pleasure, and are not to be driven away." [94]

Since 1898, the status of the leased territories has been changed to a certain extent. After the Russo-Japanese War, the Chinese government consented to all the transfers and assignments made by Russia to Japan, including the lease of Port Arthur and Talien-wan,[95] which were later extended to a term of ninety-nine years as a result of the Japanese demand in 1915.[96] Kiaochow was occupied by Japan during the World War, and eventually returned to China after the Washington Conference by the Treaty between Japan and China for the Settlement of Outstanding Questions relative to Shantung, signed at Washington, February 4, 1922.[97] When Port

[93] Art. I.

[94] Pars. 1, 2.

[95] See Art. I of the Treaty and Additional Agreement between China and Japan respecting Manchuria, signed at Peking, December 22, 1905 (Hertslet, Vol. 1, No. 67).

[96] See Group II, Art. I of the Twenty-one Demands presented by Japan to China, February 18, 1915 (MacMurray, Vol. 2, pp. 1231-1234). See also Japan's Ultimatum to China, May 7, 1915, and China's Reply to Japanese Ultimatum, May 8, 1915 (*Ibid.*, Vol. 2, pp. 1234-1236).

[97] Ratifications exchanged at Peking, June 2, 1922. For the text of the Treaty, see *Supplement to MacMurray's Treaties*, pp. 80-88. See also the Agreement between Japan and China for the Withdrawal of the Japanese Troops along the Line of the Shantung Railway, March 28, 1922 (*Ibid.*, pp. 100-101); the Agreement between Japan and China giving Details of Arrangements for the Settlement of Outstanding Questions in connection with Shantung, signed at Peking, December 1, 1922 (*Supplement to MacMurray's Treaties*, pp. 114-126). For details, see W. W. Willoughby, *Foreign Rights and Interests in China*, Vol. 1, Chs. 9-11.

Arthur was transferred from Russia to Japan after the Russo-Japanese War, Weihaiwei was to be automatically restored to China according to the Sino-British Convention of July 1, 1898,[98] but that restoration was not actually made until 1930.

As the leased territories constitute a virtual *imperium in imperio* in China, their continuing existence is certainly detrimental to China's territorial sovereignty. The Chinese reaction toward the leased territories culminated in the issue of the following Presidential Mandate of May 13, 1915, concerning the non-alienation of the coasts of China, in response to the Memorial from the Ts'an Cheng Yuan:

"Memorial from the Ts'an Cheng Yuan:

"During the days of the Ch'ing regime when the power and influence of the nation were on the decline, the coast was the scene of many military activities. Consequently some parts of the coast were ceded, for some reason, while others were leased to foreign countries; thus many strategic points fell into the hands of foreign countries, the means of defence were practically lost to China, whose people have since not been able to enjoy peace. This is directly in conflict with the principle of defending the country by occupying the strategical points. We therefore suggest to the Government that at this time when our country has just passed through a critical period, we should profit by past experience and make plans for the future. An open order should be given to the ministers of war and marine and the officials on the sea-coast to give special attention to coast defence, so that the people residing in these regions may live in peace in their homes and pursue their occupations. A declaration should be made to the world that hereafter no port, bay or island along the coast of China shall be ceded or leased to any foreign country, that the nation may be secure and international relations may be amicable. This matter was brought up for discussion at a meeting held on May 12 and unanimously passed. We thereby respectfully present this suggestion for promulgation, etc.

"*President's Rescript*: Since the coastal regions are closely connected with national defence and should be well fortified, the suggestion of the Ts'an Cheng Yuan is indeed far-sighted. It is promulgated herewith. Hereafter no port, bay or island along the coast of China will be ceded or leased to any foreign country. The ministers of war and marine and the officials on the sea-coast are hereby made responsible for the defence of the same so that the sovereignty of the nation may be consolidated." [99]

At the Washington Conference, 1921-1922, the Chinese delegation strongly urged the interested Powers to relinquish their leased

[98] See *supra*, p. 20.
[99] MacMurray, Vol. 2, No. 1915/7.

territories, giving some important reasons. At the twelfth meeting of the Committee on Pacific and Far Eastern Questions, held on December 13, 1921, Dr. V. K. Wellington Koo made a statement, in which the attitude of the Chinese government toward leased territories was fully expressed. The following is an extract from Dr. Koo's statement:

"The existence of such leased territories had greatly prejudiced China's territorial and administrative integrity, because they were all situated at strategical points along the Chinese littoral. Furthermore, these foreign leaseholds had hampered her work of national defense by constituting in China a virtual *imperium in imperio,* i.e., an empire within the empire. There was another reason which the Chinese delegation desired to point out. The shifting conflict of interests of the different lessee Powers had involved China more than once in their complications. It would be sufficient to refer here to the Russo-Japanese War, which was caused by the Russian occupation of Port Arthur and Dalny. The Kiaochow leasehold brought upon the Far East the hostilities of the European war. Furthermore, some of these territories were utilized with a view to economic domination over the vast adjoining regions, as *points d'appui* for developing spheres of interest to the detriment of the principle of equal opportunity for the commerce and industry of all nations in China. In the interest not only of China, but of all nations, and especially with a view to the peace of the Far East, the Chinese delegation asked for the annulment and early termination of these leases. But pending their termination, these areas should be demilitarized, that is, their fortifications dismantled—and it was hoped that the lessee nations would undertake not to make use of their several leased areas for military purposes, either for naval bases or for military operations of any kind whatsoever." [100]

On November 22, 1921, the Chinese delegation made a declaration regarding the non-alienation or lease of Chinese territory at the fourth meeting of the Committee on Pacific and Far Eastern Questions. It reads as follows:

"China, upon her part, is prepared to give an understanding not to alienate or lease any portion of her territory or littoral to any Power." [101]

Among the Lessee Powers, Great Britain showed considerable sympathy for China's natural aspirations as revealed at the Con-

[100] *Conference on the Limitation of Armament, Washington, November 12, 1921 to February 6, 1922* (hereafter cited as *Washington Conference, 1921-22*), pp. 1060-1062. The statement on leased territories made by Dr. Koo at the Washington Conference is similar to that contained in "Questions for Readjustment" submitted to the Paris Peace Conference, although the latter was only coolly received.

[101] *Washington Conference, 1921-22,* p. 908.

ference, and promised the return of Weihaiwei. This was actually accomplished as a result of the Convention between Great Britain and China for the Rendition of Weihaiwei and Agreement regarding Certain Facilities for the British Navy after Rendition, signed at Nanking, April 18, 1930.[102] There is no prospect of the restoration of other leased territories to China in the near future.[103]

Foreign Concessions and Settlements

Foreign concessions and settlements are urban areas set apart by the Chinese authorities for residence by aliens. The Sino-British Treaty of 1842 authorizes British subjects "to reside for the purpose of carrying on their mercantile pursuits, without molestation or restraint at the Cities and Towns of Canton, Amoy, Foochowfoo, Ningpo, and Shanghai."[104] Similar rights were granted to other nationals by later treaties and the operation of the most-favored-nation treatment.[105] Since 1842, many other places have been opened for foreign residence, and, with the exception of Peking,[106] most of the commercial centres in China today have foreign concessions and settlements.

In no case, however, have such areas been taken from under Chinese sovereignty. For example, the Additional Articles to the Treaty of Commerce between the United States and China of June

[102] *League of Nations Treaty Series*, Vol. 112 (1931), pp. 50-63.

[103] For references on the leased territories in China, see W. W. Willoughby, *Foreign Rights and Interests in China*, Vol. 1, Chs. 17-18; F. L. Yang, *Les territoires a bail en Chine* (1929); Tao Wen-tsing, *Leased Territories in China* (1915); A. Bonningue, *La France à Kouang-Tcheou-Wan* (1931); R. A. Norem, *Kiaochow Leased Territory* (1936); C. W. Young, *The International Legal Status of the Kwangtung Leased Territory* (1931); Chin Wen-sze, "The Leased Conventions between China and the Foreign Powers: An Interpretation," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 1 (1916), No. 4, pp. 24-36; Kao Yin-t'ang, "The Leased Conventions in China," *ibid.*, Vol. 12 (1928), No. 4, pp. 516-542.

[104] Art. II.

[105] See, for example, the Convention between Germany and China in regard to A Concession in the Treaty Port of Hankow, signed at Hankow, October 3, 1895 (MacMurray, Vol. 1, No. 1895/8); Convention between Germany and China in regard to A Concession in the Treaty Port of Tientsin, signed at Tientsin, October 30, 1895 (*Ibid.*, Vol. 1, No. 1895/9); Protocol between Japan and China concerning Japanese Settlements, Inland Navigation, Taxes on Manufactures, etc., signed at Peking, October 19, 1896 (*Ibid.*, Vol. 1, No. 1896/6).

[106] The Legation Quarter at Peking is not of the nature of a foreign concession or settlement. By Art. X of the Sino-Japanese Treaty of 1903, a certain area at Peking might be selected for foreign residence after the withdrawal of foreign legation troops. But this has never come into effect, because foreign legation troops are still maintained at Peking.

18, 1858, signed at Washington, on July 28, 1868,[107] explicitly provide:

"His Majesty the Emperor of China, being of opinion that, in making concessions to the citizens or subjects of foreign Powers of the privilege of residing on certain tracts of land, or resorting to certain waters of that Empire for purposes of trade, he has by no means relinquished his right of eminent domain or dominion over the said land and waters, hereby agrees that no such concession or grant shall be construed to give to any Power or party which may be at war with or hostile to the United States the right to attack the citizens of the United States or their property within the said land or waters. And the United States, for themselves, hereby agree to abstain from offensively attacking the citizens or subjects of any Power or party or their property with which they may be at war on any such tract of land or waters of the said Empire. But nothing in this Article shall be construed to prevent the United States from resisting an attack by any hostile Power or party upon their citizens or their property. It is further agreed that, if any right or interest in any tract of land in China has been or shall hereafter be granted by the Government of China to the United States or their citizens for purpose of trade or commerce, that grant shall in no event be construed to divest the Chinese authorities of their right of jurisdiction over persons and property within said tract of land, except so far as that right may have been expressly relinquished by Treaty." [108]

In fact, the Governments of foreign Powers have held the same view that China's sovereignty in the concessions and settlements is not surrendered. In his instructions to Sir Frederic Bruce, British Minister at Peking, April 8, 1863, Earl Russell, British Secretary for Foreign Affairs, stated:

"The lands situated within the limits of the British Settlement are without doubt Chinese territory, and it cannot reasonably be held that the mere fact of a residence within those limits exempts Chinese subjects from fulfilling their natural obligations." [109]

Nevertheless, the exercise of China's territorial sovereign rights in the foreign concessions and settlements have been much restricted: first, China has been denied her right of plenary jurisdiction over her own citizens residing in such areas; secondly, Chinese troops have been denied the right of passage through such areas; and, lastly, the administrative power of the municipal councils of such areas has been wielded by foreigners, since Chinese residents are not proportionately represented in the municipal councils.[110] Hence,

[107] Hertslet, Vol. 1, No. 96.
[108] Art. I.
[109] *Chinese Soc. and Pol. Sci. Rev.*, Vol. 5a (1920), Nos. 1-2, p. 148.
[110] See *ibid.*, pp. 147-148.

in the 'Questions for Readjustment' submitted by China to the Paris Peace Conference of 1919, the Chinese delegation pointed out:

"This assertion of exclusive authority and power has made each concession virtually 'un petit état dans l'état', to the impairment of China's right as a territorial sovereign." [111]

In view of this abnormal situation, which has inevitably led to friction between China and other nations, and in view of the recent improvement in Chinese municipal government, the Chinese delegation pleaded for the restoration of all foreign concessions and settlements to China.[112] This legitimate demand was unfortunately disregarded by the Powers at the Paris Peace Conference, and at the Washington Conference, 1921-1922, there was no direct discussion of the subject.

The Chinese government has continued to press for the abandonment of foreign concessions and settlements. Those held by Germany and Austria-Hungary were virtually relinquished as a result of the World War. When Sino-Russian relations were severed in September, 1920, the Chinese government took back all the Russian concessions in China.[113] By the Agreement between Soviet Russia and China on General Principles for the Settlement of the Questions between the Two Countries, signed at Peking, May 31, 1924,[114] Soviet Russia voluntarily renounced all such rights.[115] When the Nationalist Party came into power, the abolition of foreign concessions and settlements was vigorously pushed. Thanks to the co-operative spirit of the interested Powers, the British concessions at Hankow,[116] Kiukiang,[117] Chinkiang,[118] and Amoy,[119] the

111 *Chinese Soc. and Pol. Sci. Rev.*, Vol. 5a (1920), Nos. 1-2, p. 148.

112 See *ibid.*, p. 151.

113 See the Note sent by the Chinese Minister of Foreign Affairs to the Dean of the Diplomatic Body at Peking, October 22, 1920 (*China Year Book*, 1921-22, p. 629).

114 *Supplement to MacMurray's Treaties*, pp. 133-140.

115 See Art. X.

116 By the Agreement between Great Britain and China relative to the British Concession at Hankow, signed at Hankow, February 19, 1927 (*Supplement to MacMurray's Treaties*, pp. 203-205).

117 By the Agreement between Great Britain and China with regard to the British Concession at Kiukiang, signed at Hankow, February 20 and March 2, 1927 (*Ibid.*, pp. 213-215).

118 See *China Year Book*, 1928, p. 928 note; A. J. Toynbee, *op. cit.*, 1929, pp. 335-336. The rendition itself took place on November 15, 1929, as a result of an exchange of notes between Great Britain and China, October 31, 1929.

119 See A. J. Toynbee, *op. cit.*, 1929, pp. 336-337; the Exchange of Notes between Great Britain and China regarding the Rendition of the British Concession at Amoy, September 17, 1930 (*League of Nations Treaty Series*, Vol. 111 (1930), pp. 154-159).

Belgian concession at Tientsin,[120] and the foreign estate at Kuling,[121] were restored to China.[122]

Spheres of Influence or Interest

The term 'sphere of influence' or 'sphere of interest' has been vaguely used to imply that the Powers making such claims in China are entitled within their respective spheres to enjoy reserved, preferential, exclusive, or special rights and privileges of trade, investment, and for other purposes.[123] Since the last decade of the nineteenth century, the Powers have struggled for spheres of influence or interest in various parts of China by means of: (1) agreements, between the Powers themselves to which China is not a party, to abstain from certain action in special parts of China or to support mutually the general interests of all foreign Powers in China or of the special interests claimed by the parties to the agreement;[124] and (2) agreements made with China under circumstances precluding the free exercise of her will.[125]

[120] By the Agreement between Belgium and China regarding Rendition of the Belgian Concession at Tientsin, signed at Tientsin, August 31, 1929 (*Ibid*, Vol. 123 (1931), pp 106-113)

[121] Strictly speaking, the foreign estate at Kuling was not of the nature of a concession or settlement About forty years ago, a missionary secured title to a small piece of land in Kuling, a mountain health resort in Kiangsi province For more than thirty years this land was controlled by the Kuling Estate Council, which exercised certain functions of government in supervising transportation, building and repair of roads and bridges, sanitation, and land transfers Through negotiations, the Chinese government succeeded in concluding an agreement with the Council whereby control of the estate reverted to China on January 1, 1936. See *China Year Book*, 1936, pp 180-181

[122] For references on foreign concessions and settlements in China, see W. W Willoughby, *Foreign Rights and Interests in China*, Vol 1, Chs 19-20, Chan Chung Sing, *Les concessions en Chine* (1925), C. B Maybon and J Fredet, *Histoire de la concession Française de Changhaï* (1929); F L H Pott, *A Short History of Shanghai* (1928)

[123] See T J Lawrence, *op cit*, Sec 81; J B. Moore, *A Digest of International Law*, Vol 1, p 269

[124] See, for example, the Declaration with regard to the Kingdom of Siam and Other Matters (Advantages in Yunnan and Szechuan, etc.), made by France and Great Britain at London, January 15, 1896 (MacMurray, Vol. 1, No 1896/1); Anglo-German Bankers' Arrangement regarding spheres of Interest in Railway Construction, September 2, 1898 (*Ibid.*, Vol. 1, pp 266-267); Exchange of Notes between Great Britain and Russia on April 28, 1899, with regard to Railway Interests in China (*Ibid*, Vol. 1, No 1899/3), Agreement between Germany and Great Britain relative to China, October 16, 1900 (*Ibid*, Vol 1, No 1900/5).

[125] See, for example, Art. V of the Agreement between Great Britain and China, modifying the Convention of March 1, 1894, relative to Burmah and Tibet, February 4, 1897; Note sent by the Tsung-li Yamen to the French Minister at Peking on March 15, 1897, assuring the Non-alienation of the Island of Hainan (Hertslet, Vol. 2, No. 183); Exchange of Notes between Great Britain and China respecting the Non-alienation of the Yangtsze Region, February 9 and 11, 1898 (*Ibid.*, Vol. 1, No. 23); Note sent by the Tsung-li Yamen to the Japanese Minister at Peking on April 26, 1898, assuring the Non-alienation of the Province of Fukien, (*Ibid.*, Vol. 2, No. 188); Arts. II and III of the Convention between the Governments of Great Britain and Tibet, signed at Lhasa, September 7, 1904 (*Ibid.*, Vol. 1, No. 32).

It is undoubtedly a most chaotic state of affairs that China should be thus divided into different spheres of influence or interest.[126] The Chinese government endeavored after the World War to abolish this practice. Failing at the Paris Peace Conference, it submitted the matter to the Washington Conference, 1921-1922. In the Committee on Pacific and Far Eastern Questions, on December 12, 1921, Dr. Wang Chung-hui, in behalf of the Chinese delegation, made a statement, pointing out the certain effects of the spheres of influence or interest in China as follows:

(1) That they seriously hampered the economic development of China;

(2) That they were contrary to the policy of equal opportunity for the commerce and industry of all nations; and

(3) That they furthered the political ends of the Powers in China under cover of economic claims, thus threatening the political integrity of China and giving rise to international jealousy or friction.[127]

In conclusion, Dr. Wang urged the Powers represented at the Conference to disavow all claims to spheres of influence or interest within the territory of China.[128]

Great Britain and the United States showed an excellent spirit of co-operation with China during the discussion of this subject at the Washington Conference. In the Nine-Power Treaty, signed at Washington, February 6, 1922,[129] the following clause is included:

"The Contracting Powers agree not to support any agreements by their respective nationals with each other designed to create Spheres of Influence or to provide for the enjoyment of mutually exclusive opportunities in designated parts of Chinese territory." [130]

Foreign Armed Forces and Demilitarized Zones

The military restrictions imposed by the foreign Powers on China's territorial sovereignty are of two kinds: maintenance of foreign armed forces in China and the demilitarization of certain zones

[126] For details, see W. W. Willoughby, *Foreign Rights and Interests in China*, Vol. 1, Chs. 6, 13.

[127] See *Washington Conference, 1921-22*, p. 1144. The reasons enumerated in the "Questions for Readjustment" submitted to the Paris Peace Conference are almost similar to those stated by Dr. Wang Chung-hui at the Washington Conference.

[128] See *ibid.*, p. 1146.

[129] *Supplement to MacMurray's Treaties*, pp. 89-93.

[130] Art. IV.

within Chinese territory. In the Joint Note sent by the Allied Powers to China on December 22, 1900, regarding conditions for Re-establishment of Normal Relations between China and the Allied Powers,[131] the following demand was included:

"Right for each Power to maintain a permanent guard for its legation and to put the legation quarter in a defensive condition. Chinese shall not have the right to reside in this quarter." [132]

This demand was accepted by the Chinese government,[133] and incorporated in the Final Protocol for the Settlement of the Disturbances of 1900, concluded between China and the Allied Powers on September 7, 1901.[134]

By the same Protocol, the Chinese government conceded the right to the Powers to occupy the following places for the maintenance of open communication between Peking and the sea: Huang-tsun, Lang-fang, Yang-tsun, Tientsin, Chun-liang Ch'eng, Tang-ku, Lu-tai, Tang-shah, Lan-chou, Chang-li, Ch'in-wan Tao, and Shan-hai Kuan.[135] However, in several other places, foreign troops, police, and railway guards have also been present, unsanctioned by treaties and against the repeated protests of the Chinese government. This was seriously objected to by the Chinese government, and put into discussion at the Washington Conference, 1921-1922.[136] At the eighth meeting of the Committee on Pacific and Far Eastern Questions, held on November 28, 1921, Dr. Sze Sao-ke, in behalf of the Chinese delegation, made a statement, clarifying the Chinese attitude toward the maintenance of foreign armed forces, police boxes, and railway guards in China. The following is an extract from Dr. Sze's statement:

"In behalf of my Government and the people whom I represent, I therefore ask that the Conference give its approval to the following proposition:

" 'Each of the Powers attending this Conference hereinafter mentioned, to wit, the United States of America, Belgium, the British Empire, France, Italy, Japan, the Netherlands, and Portugal, severally declare that, without the

131 MacMurray, Vol. 1, pp. 309-310.

132 Art. 7.

133 See the Reply of the Chinese Plenipotentiaries to the Joint Note of December 22, 1900, sent by the Allied Powers—January 16, 1901 (MacMurray, Vol. 1, p. 310).

134 See Art. VII. For the text of the Protocol, see MacMurray, Vol. 1, No. 1901/3. As to the boundaries of the legation quarter at Peking, see Annex No. 14 to the Protocol (*Ibid.*, Vol. 1, pp. 298-299).

135 See Art. IX.

136 China's aspiration for the withdrawal of foreign armed forces from China was fruitless at the Paris Peace Conference.

consent of the Government of China, expressly and specifically given in each câse, it will not station troops or railway guards or establish and maintain police boxes, or erect or operate electrical communication installations, upon the soil of China; and that if there now exist upon the soil of China such troops or railway guards or police boxes or electrical installations without China's express consent, they will be at once withdrawn.' " [137]

The Chinese proposition was accepted by the Washington Conference in principle,[138] although not practically followed by the Powers.[139]

With regard to the demilitarized zones, the Chinese government has evidently acquiesced in this practice. In the Convention between Great Britain and China, giving Effect to Article 3 of the Convention of July 24, 1886, relative to Burmah and Tibet, signed at London, March 1, 1894,[140] the demilitarization of a certain area along the common frontier was provided:

"The High Contracting Parties further engage neither to construct nor to maintain within 10 English miles from the nearest point of the common frontier, measured in a straight line and horizontal projection, any fortifications or permanent camps, beyond such posts as are necessary for preserving peace and good order in the frontier districts." [141]

As a result of the Boxer Uprising in 1900, the Chinese government consented to raze the forts of Taku and those which might impede free communication between Peking and the sea.[142] The demolition of these forts was interpreted by Note 5, annexed to the Final Protocol concluded between China and the Allied Powers, September 7, 1901, as follows:

"The demolition of the forts implies an obligation upon China not to reconstruct them, and the same obligation applies to the walls of Tientsin city, which, during the troubles of 1900, were made use of as a fortification directed against the security of the foreign settlements. We can not, however, consent that the Chinese Government establish maritime defense at the mouth of the Peiho at Chingwangtao or at Shanhaikuan." [143]

Certainly the existence of the demilitarized zones in China is also detrimental to her territorial sovereignty. Yet this question had been

[137] *Washington Conference, 1921-22,* p. 982.

[138] See the Resolution regarding Foreign Armed Forces in China (*Ibid.*, p. 1648).

[139] For example, Japan has never withdrawn her armed forces from Manchuria after the Washington Conference.

[140] MacMurray, Vol. 1, No. 1894/1.

[141] Art. VII, Par. 2.

[142] See Art. VIII of the Final Protocol concluded between China and the Allied Powers, September 7, 1901.

[143] MacMurray, Vol. 1, p. 317.

neither mentioned in the "Questions for Readjustment" submitted to the Paris Peace Conference nor raised at the Washington Conference.

China's Aspiration and Efforts to Recover Territorial Sovereignty

It is needless to say that the Chinese people have deeply resented the continuing existence of various restrictions imposed by foreign Powers upon China's free exercise of territorial sovereignty. After an analytical discussion, it is advisable to reveal the attitude of the Chinese government toward such restrictions as a whole, and its constant aspiration and efforts to terminate them. For this purpose, the Washington Conference of 1921-1922 should again be reviewed. At the first meeting of the Committee on Pacific and Far Eastern Questions, held on November 16, 1921, Dr. Sze Sao-ke, in behalf of the Chinese delegation, made an important statement, from which the following is an excerpt:

"1. (a) The Powers engage to respect and observe the territorial integrity and political and administrative independence of the Chinese Republic.

"(b) China upon her part is prepared to give an undertaking not to alienate or lease any portion of her territory or littoral to any Power.

"2. China, being in full accord with the principle of the so-called open door or equal opportunity for the commerce and industry of all nations having treaty relations with China, is prepared to accept and apply it in all parts of the Chinese Republic without exception.

"3. With a view to strengthening mutual confidence and maintaining peace in the Pacific and Far East, the Powers agree not to conclude between themselves any treaty or agreement directly affecting China or the general peace in these regions without previously notifying China and giving to her an opportunity to participate.

"4. All special rights, privileges, immunities or commitments, whatever their character or contractual basis, claimed by any of the Powers in or relating to China are to be declared, and all such or future claims not so made known are to be deemed null and void. The rights, privileges, immunities and commitments, now known or to be declared, are to be examined with a view to determining their scope and validity and, if valid, to harmonizing them with one another and with the principles declared by this Conference.

"5. Immediately or as soon as circumstances will permit, existing limitations upon China's political, jurisdictional and administrative freedom of action are to be removed.

"6. Reasonable, definite terms of duration are to be attached to China's present commitments which are without time limits." [144]

[144] *Washington Conference, 1921-22*, pp. 866-868.

Pending the abolition of all special rights, privileges, and concessions obtained by foreign Powers from China, Dr. Sze emphasized that instruments effecting such grants should be strictly construed in favor of the grantor.[145]

As a whole, the Chinese presentation was well received at the Washington Conference. With the exception of several resolutions on individual topics later adopted,[146] the famous Root Resolutions on general principles were agreed upon by the Powers at the third meeting of the Committee on Pacific and Far Eastern Questions, held on November 21, 1921. The gist of the Root Resolutions is insistence on respect for China's territorial sovereignty and maintenance of the open door policy in China:

"It is the firm intention of the Powers attending this Conference hereinafter mentioned, to wit, the United States of America, Belgium, the British Empire, France, Italy, Japan, the Netherlands, and Portugal:

"(1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China;

"(2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable Government;

"(3) To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China;

"(4) To refrain from taking advantage of the present conditions in order to seek special rights or privileges which would abridge the rights of the subjects or citizens of friendly States and from countenancing action inimical to the security of such States." [147]

Not all the States represented at the Washington Conference have, however, observed these Resolutions. Of course, China's aspirations cannot be satisfied by words only.

China's attitude toward such restrictions as mentioned above cannot be fully and correctly explained without mentioning the fundamental foreign policy of the Nationalist Party, which has recently played a predominant part in Chinese politics. At its first national congress, held at Canton in January, 1929, the Nationalist Party adopted a unique party program[148] with the following articles as part of its foreign policy:

145 See *Washington Conference, 1921-22*, p. 868, No. 7.

146 See *ibid.*, pp. 1640-1659.

147 *Ibid.*, p. 900.

148 Its text can be found in *The Collected Laws of the Chinese Republic*, Chung Hwa press, 1934 (hereafter cited as *C.L.C.R./1*), Vol. 1, pp. 24-26.

"(1) All unequal treaties, such as those providing for leased territories, extraterritorial privileges, foreign control of customs tariffs, and the exercise of political authority over Chinese territories which impairs the sovereignty of the Chinese nation, shall be abolished, and new treaties concluded on the basis of absolute equality and mutual respect for sovereign rights.

"(2) All countries that are willing to abandon their special privileges in China and to abolish any treaties which impair Chinese sovereignty shall be accorded most-favored-nation treatment.

"(3) All other treaties between China and foreign powers, which are in any way prejudicial to the interests of China, shall be revised according to the principle of non-infringement of each other's sovereignty." [149]

One of the ultimate aims of the party program, which has since been followed by the National Government, is to secure for China a position of independence and equality among the family of nations. This is evidenced in the following will of Dr. Sun Yat-sen, leader of the Nationalist Party and founder of the Chinese Republic:[150]

"For forty years I have devoted myself to the cause of National Revolution, the aim of which is to secure for China a position of independence and equality among nations. The accumulated experience of these forty years has fully convinced me that to attain this goal it is necessary to awaken the mass of our people and associate ourselves with those peoples of the world who treat us on a footing of equality in the common struggle.

"At present, the work of the Revolution is not yet achieved. Let all my comrades follow my writings, *The Program of National Reconstruction, The Outline of National Reconstruction, The Three People's Principles,* and the Manifesto of the First National Congress of the Nationalist Party, and work unceasingly for their ultimate realization. Above all, the convocation of a National People's Convention and the abolition of unequal treaties, which I have recently advocated, should be accomplished within the shortest possible time. This is my last will." [151]

Evidently Dr. Sun had ever had in mind that, in order to secure for China a position of independence and equality among nations, all the treaties derogatory to her territorial sovereignty should be abolished and that the Manifesto of the First National Congress of the Nationalist Party, in which the party program is included, should be followed, together with his other writings. Dr. Sun's will has been considered so important by the Nationalist Party that its

[149] *C.L.C.R.*/1, Vol. 1, p. 24.

[150] For Dr. Sun's revolutionary career, see the present writer's *The Nationalist Movement in China: Origin, Development and Present Status,* Chs. 3-5, 7.

[151] *The Collected Works of Sun Yat-Sen* (Shanghai: Tai-Chung Press, 1929), Vol. 4, Appendix, p. 13. For a brief review of Dr. Sun's writings mentioned in his will, see the present writer's *The Nationalist Movement in China: Origin, Development and Present Status,* Ch. 6.

members are urged to keep it always in mind, and it is recited at the opening of every meeting whether political or not. In accordance with his will, the National Government, in May, 1931, convoked the National People's Convention, which was attended by representatives from all parts of China and by Chinese from overseas.[152] At the meeting of May 13, the issue of a Manifesto concerning the Abrogation of Unequal Treaties was resolved.[153] After stating the origin of the unequal treaties and reasons for their abrogation, the Manifesto concludes:

"In view of the foregoing circumstances, the National People's Convention, being representative of the entire Chinese people, solemnly declares the following to the entire world:

"(1) The Chinese people will not recognize all the past unequal treaties imposed by the Powers on China.

"(2) The National Government shall, in conformity with Dr. Sun Yat-Sen's testamentary injunction, achieve with the least possible delay China's equality and independence in the Family of Nations."[154]

Backed by the strong determination of the people, the Nationalist regime has achieved a great deal in recovering China's territorial sovereignty, such as tariff autonomy,[155] rendition of Weihaiwei, and relinquishment of several foreign concessions and settlements.[156] Had it not been for the Japanese invasion beginning with 1931, China's aspirations might soon have been realized.

[152] For details of the Convention, see *A Collection of Manifestoes Issued and Resolutions Adopted by the National People's Convention*, published by the Department of Propaganda of the Central Executive Committee of the Nationalist Party, 1931.

[153] For the text of the Manifesto, see *ibid.*, pp. 39-43; *Chinese Soc. and Pol. Sci. Rev.*, Vol. 15 (1931-32), Supp., pp. 461-465.

[154] *Ibid.*, Vol. 15 (1931-32), Supp., p. 465.

[155] See M. T. Z. Tyau, *Two Years of Nationalist China*, pp. 102-104.

[156] See *supra*, pp. 23-24, 26-27.

CHAPTER II

JURISDICTION OVER SHIPS[1]

I. National Character of Ships

SHIPS ARE GENERALLY considered as a floating portion of the territory of a State under whose flag they sail. The fact that the Chinese government recognizes this principle is indicated by Article 3 of the Criminal Code promulgated by the National Government on January 1, 1935:[2]

"This Code is applicable to crimes committed within the Chinese territory. Crimes committed in Chinese ships or airplanes outside of Chinese territory shall be considered as if they are committed within Chinese territory."[3]

Since there is no rule of international law regulating the national character of ships, each State has the right to prescribe conditions to this effect. According to the Code of Maritime Commerce, promulgated by the National Government on December 30, 1929,[4] the following ships are of Chinese nationality:

(1) Those owned by the Chinese government.
(2) Those owned by Chinese nationals.

[1] The term "ship" is defined by Webster's New International Dictionary as follows

"In general, any vessel intended or used for navigation, or such a vessel not of the kind propelled by oars, paddles, or the like, a water craft or vessel In popular usage, and more especially in various legal uses, the term *ship* has a very broad meaning, varying more or less with the context in which it is used Thus in various matters of maritime and international law, as with reference to salvage, *ship* may mean any vessel used for purposes of navigation, any locomotive machine or structure intended or used for transportation on rivers, seas oceans, or other navigable waters, without regard to its form or means of locomotion, any structure or vessel fitted for navigation For the purposes of some statutes it has even a broader definition, as in the English Foreign Enlistment Act, where it is defined as including "any description of boat, vessel, floating battery, or floating craft, also, any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of, and sometimes under, water '

[2] For the text of the Code, see *The Collected Laws of the Chinese Republic*, Commercial Press, 1936 (hereafter cited as *C L C R /2*), Vol 1, pp 137 155.

[3] Article 5 of the Regulations relating to Criminal Procedure, promulgated by the National Government on January 1, 1935, further provides

"Cases shall be tried by the court of the place where the crime has been committed or where the offender has domicile or residence

"Crimes committed in a Chinese ship or airplane outside of the Chinese territory shall be tried by the Court of the place where the ship is registered or the airplane started or landed "

For the text of the Regulations, see *C L C R /2*, Vol 1, pp 233-256

[4] *Ibid*, Vol 1, pp. 112-120

(3) Those owned by companies which are established in accordance with Chinese laws and have their main offices in China; namely, (*a*) companies with unlimited liability, of which all the shareholders are Chinese nationals; (*b*) joint-stock companies or partnerships, of which all the shareholders with unlimited liability are Chinese nationals; and (*c*) companies with limited liability, of which two-thirds of the trustees are Chinese nationals and two-thirds of the capital is owned by Chinese nationals.[5]

However, the national character of a ship is not unchangeable. On the contrary, it can be changed from one nationality to another through the transfer of ownership. With regard to the validity of ownership, the same Code lays down the following regulations, without discrimination as to whether the Chinese ships be sold to Chinese nationals or to foreigners:

"The sale of a ship either in whole or in part shall be considered invalid, unless it is evidenced by a written document in accordance with the following regulations

"(1) In China, the document shall be submitted to the proper authorities of the place where the sale is made or the ship is located, and it shall be evidenced by the said authorities with seal.

"(2) In foreign countries, the document shall be evidenced by the Chinese consulate with seal." [6]

The Chinese government recognizes that the nationality of ships of different States is decided according to their respective laws. For example, the Treaty of Friendship, Commerce, and Navigation between Poland and China, signed at Nanking, September 18, 1929,[7] provides:

"All vessels, which under Polish law are regarded as Polish vessels, and all vessels which under Chinese law are regarded as Chinese vessels, shall be considered, for the purposes of this Treaty, as Polish and Chinese vessels respectively." [8]

II. Flag of Ships

As a rule, the maritime flag of a ship is the sign of her nationality.[9] According to Chinese law, ships sailing under the

[5] Art 3

[6] Art 10

[7] *League of Nations Treaty Series*, Vol. 120 (1932), pp. 360-366.

[8] Art XV.

[9] For the regulation of signals of Chinese ships, including the location of the ships' names, see the Regulations relating to the Signals of Ships, promulgated by the Ministry of Communications, February 2, 1934 (*C.L.C.R./2*, Vol. 8, p. 4816).

Chinese flag shall have certificates of Chinese nationality.[10] In other words, foreign ships cannot sail under the Chinese flag.[11] Fraudulent use of the flag is prohibited.[12]

It is interesting to note a Sino-British controversy over the use of the British flag by native junks during the period of the Tai-ping Revolution. The Tai-ping authorities at Nanking, in a note to the British Commander, Mr. Bingham, on January 1, 1862, contested the British argument that native junks carrying British colors were British ships. The following is an extract from the said note :

". . . Now in the agreement concluded with you in the spring, it is not stated that junks carrying British colors are no less British vessels than those which are foreign-built, and are therefore entitled to pass free from examination and molestation.

"But if native junks should be largely employed by your nation, we have good cause to fear the treachery by the Imperial imps, who will employ these junks in the furtherance of their own dark and evil designs by falsely passing them off as your trading-craft." [13]

However, this contention was based upon political rather than legal ground. Since the Tai-ping regime had never been recognized as the *de jure* government of China, its view cannot be considered as official.

The Chinese government has, however, made it plain that neutral flags might not be used to protect or help an enemy's vessels in any way when China should be at war with a foreign nation. The Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, signed at Canton, March 20, 1847,[14] provides:

"Relations of peace and amity being established by this Treaty between the United Kingdoms of Sweden and Norway and the Chinese Empire, and the Swedish and Norwegian vessels being admitted to trade freely to and from the 5 ports of China open to foreign commerce, it is further agreed, that in case at any time hereafter China should be at war with any foreign nation whatever, and for that cause should exclude such nation from entering her ports, still the vessels of the United Kingdoms of Sweden and Norway shall

[10] See Art. 5 of the Laws relating to Ships, promulgated by the National Government on December 4, 1930 (*Ibid.*, Vol. 8, pp. 4783-4784); Regulations relating to the Nationality Certificate of Ships, promulgated by the Ministry of Communications on June 5, 1931 (*Ibid.*, Vol. 8, pp. 4816-4817).

[11] See Art. 2 of the Laws relating to Ships, 1930.

[12] See, for example, Art. VIII of the Treaty of Friendship, Commerce, and Navigation between France and China, signed at Whampoa, October 24, 1844 (Hertslet, Vol. 1, No. 39); Art. XXVIII of the Treaty of Friendship, Commerce, and Navigation between France and China, signed at Tientsin, June 27, 1858 (*Ibid.*, Vol. 1, No. 40).

[13] *Fontes Juris Gentium*, Ser. B, Sec. 1, Vol. 1, Pt. 1, p. 494, No. 1330.

[14] Hertslet, Vol. 1, No. 93.

not the less continue to pursue their commerce in freedom and security, and to transport goods to and from the ports of the belligerent parties, full respect being paid to the neutrality of the flag of the United Kingdoms of Sweden and Norway, provided that the said flag shall not protect vessels engaged in the transportation of officers and soldiers in the enemy's service; nor shall said flag be fraudulently used to enable the enemy's ships with their cargoes to enter the ports of China; but all such vessels so offending shall be subject to forfeiture and confiscation to the Chinese Government." [15]

III. Jurisdiction over Privately Owned Merchant Ships

It is a general rule of international law that foreign private ships are, when within the territorial and national waters of a State, subject to its jurisdiction. Thus, in the Laws relating to Ships, 1930, the Chinese government lays down the rule that foreign ships cannot anchor in Chinese ports, bays, and coastal waters with the following exceptions:

(1) Where the matter is otherwise regulated by special laws ;

(2) Where permission has been given by the Chinese government; and

(3) Where the ship has been driven in under *force majeure*.[16]

As a matter of fact, most foreign nations have, by treaty provisions, obtained the right of navigation in Chinese territorial and national waters. Foreign ships navigating in these waters must, however, observe the rules and regulations prescribed by Chinese laws or treaties concluded between China and other nations. The Treaty of Friendship, Commerce, and Navigation between Sweden and China, 1908, provides:

"Swedish merchant vessels may proceed to all the Treaty Ports of China already opened or which may hereafter be opened, for the transportation of merchandise and for purposes of trade. They may also proceed to the inland waters in China which foreign merchant vessels are at liberty to navigate, and to the ports of call along the rivers for the purpose of landing and shipping passengers and goods. In all these matters they shall be subject to the Rules and Regulations concluded by China with other foreign powers." [17]

Similar clauses were included in other treaties. Article VII of the Treaty of Friendship, Commerce, and Navigation between China

[15] Art. XXII. A similar clause was included in Art. VII of the Treaty of Friendship, Commerce, and Navigation between Sweden and China, signed at Peking, July 2, 1908 (MacMurray, Vol. 1, No. 1908/11).

[16] Art. 3.

[17] Art. VI, Par. 1.

and Mexico, signed at Washington, December 14, 1899,[18] for example, reads:

"The citizens or subjects and merchant-vessels of each of the High Contracting Parties shall be subject, at the ports of the other open to foreign commerce, to the legal provisions which now regulate commerce with all other nations or which may be issued hereafter."

Likewise, the Treaty of Friendship, Commerce, and Navigation between Poland and China, 1929, provides:

"Each of the two Contracting Parties undertakes to allow merchant vessels of the other Party, within the limits of the laws and regulations in force, to enter, anchor, load or unload goods and take on board and land passengers in those of its seaports which are open to trade. These vessels must comply with all the regulations of the port in which they are." [19]

In the Regulations governing the Trading Ports, promulgated on June 27, 1933,[20] the National Government prescribes:

"All ships, national or foreign, entering the trading ports shall observe all the regulations.

"They shall also comply with the quarantine regulations prescribed therein." [21]

To the same end, other rules and regulations have been formulated and enforced by the Chinese government. The Regulations relating to the Examination of the Documents of Ships Navigating in Chinese Territorial Waters, 1935,[22] provide that foreign ships navigating in Chinese territorial waters shall submit to the local authorities the ships' documents and their nationality certificates for examination; otherwise they shall be confiscated.[23] The Regulations relating to the Investigation of Ships, promulgated by the Ministry of Communications on December 28, 1933,[24] further require:

"Unless there are special laws regulating otherwise, the following ships shall be investigated according to the present Regulations:

"(1) Leased by Chinese nationals for inland or maritime navigation;

[18] Hertslet, Vol. 1, No. 69.
[19] Art. XV, Par. 2.
[20] *C.L.C.R./2*, Vol. 8, pp. 4836-4837.
[21] Arts. 24, 25.
[22] The Regulations were promulgated by the Executive *Yuan* on July 30, 1934, and revised in July, 1935. For the text, see *C.L.C.R./2*, Vol. 8, pp. 4818-4820.
[23] See Art. 1.
[24] *C.L.C.R./2*, Vol. 8, pp. 4791-4794.

"(2) Allowed by the Chinese government or by Chinese laws to navigate in Chinese waters; and

"(3) Under the conditions designated by Article 17 of the Laws relating to Ships." [25]

The visiting of non-open ports by foreign ships, and clandestine trade or smuggling have been strictly prohibited by the Chinese government. Various treaties have been concluded between China and foreign nations on this matter. The Treaty of Friendship, Commerce, and Navigation between Sweden and China, 1908, for example, provides:

"If a Swedish vessel should unlawfully enter ports other than open ports and ports of call in China, or carry on clandestine trade along the coast or rivers, the vessel with her cargo shall be subject to confiscation by the Chinese Government." [26]

However, the visiting of non-open ports because of stress of weather, or some other urgent distress and necessity is exceptionally permitted, as shown, for example, by the provision of the Treaty of Friendship and Commerce between China and the Netherlands, signed at Tientsin, October 6, 1863:[27]

"Netherland merchant ships must not, for purposes of trading, touch at any other places in China than the ports opened by this Treaty, on pain of confiscation of ship and cargo. If, however, a ship should from urgent distress and necessity take refuge in a port that is not open, then this penal provision is not applicable; but the Chinese authorities shall take measures to protect the ship and to put it in a condition to continue its voyage, without allowing any unlawful trading to take place in the port, which is forbidden on pain of confiscation of ship and cargo." [28]

The prohibition of smuggling was provided for in several treaties. For example, Article XLVIII of the Treaty of Peace, Friendship, and Commerce between Great Britain and China, 1858, reads:

[25] Art. 3. Art. 17 of the Laws relating to Ships reads as follows:

"The captain of a foreign ship, which loads cargo from a Chinese port and is to sail therefrom to other ports, shall present to the authorities in charge of navigation of that port her 'certificate of investigation'; and if the said certificate is no longer valid by reason of the expiration of the period of validity, the ship shall be investigated by the local authorities."

[26] Art. VI, Par. 2. Similar clauses were provided for in Art. XLII of the Treaty of Peace, Friendship, and Commerce between Great Britain and China, signed at Tientsin, June 26, 1858 (Hertslet, Vol. 1, No. 6); Art. XLIII of the Treaty of Amity, Commerce, and Navigation between China and Spain, signed at Tientsin, October 10, 1864 (*Ibid.*, Vol. 1, No. 91); Art. X of the Treaty of Amity and Commerce between Corea and China, signed at Seoul, September 11, 1899 (*Ibid.*, Vol. 1, No. 37).

[27] Hertslet, Vol. 1, No. 70.

[28] Art. XII, Par. 2. See also *infra*, pp. 48-49.

"If any British merchant vessel be concerned in Smuggling, the goods, whatever their value or nature, shall be subject to confiscation by the Chinese authorities, and the ship may be prohibited from trading further, and sent away as soon as her accounts shall have been adjusted and paid" [29]

Likewise, contraband and fraudulent goods, or cargo landed or shipped without permit from the Customs Office, shall be liable to confiscation.[30] Furthermore, neutral ships in Chinese waters shall not be used in any way to help or protect an enemy's vessels during a war between China and foreign nations. If they do so, they are subject to forfeiture and confiscation.[31]

On the other hand, foreign ships in Chinese waters are entitled to full protection and fair treatment from the Chinese government if they observe all the rules and regulations. In the Treaty of Friendship, Commerce, and Navigation between China and Mexico, 1899, the charge of higher duties or fees upon Mexican ships than ships of other nations in Chinese waters, or *vice versa,* is prohibited:

"The vessels of each of the Contracting Parties shall not be subject, in the territory or ports of the other, on their entrance, departure, or stay, to other or higher duties, charges, or fees of public officials, on account of tonnage, lighthouse, port, pilotage, quarantine, salvage, assistance in case of damage or shipwreck, nor to other charges or duties, local or federal, of whatever kind or denomination, than are paid or which may hereafter be paid by vessels of any other nation." [32]

Imposing an embargo on foreign ships as well as on their cargoes and their detention for public service have been prohibited in several treaty provisions. Article XXVIII of the Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, 1847, reads:

"Subjects of His Majesty the King of Sweden and Norway, their vessels and property, shall not be subject to any embargo; nor shall they be seized or forcibly detained for any pretence of the public service; but they shall be

[29] Similar clauses can be found in Art. XII of the Treaty of Friendship and Commerce between China and the Netherlands, October 6, 1863; Art. LV of the Treaty of Amity, Commerce, and Navigation between China and Spain, October 10, 1864.

[30] See Art VIII of the Treaty of Friendship, Commerce, and Navigation between France and China, October 24, 1864; Art. XXXIX of the Treaty of Peace, Friendship, and Commerce between Great Britain and China, June 26, 1858; Art. XXVIII of the Treaty of Friendship, Commerce, and Navigation between China and France, June 27, 1858; Art. XVI of the Treaty of Commerce between Austria and China, signed at Vienna, October 19, 1925 (*Supplement to MacMurray's Treaties,* pp. 165-169).

[31] See *supra,* pp 37-38.

[32] Art. XI, Par. 3. See also Art. VI, Par. 5 of the Treaty of Friendship, Commerce, and Navigation between Sweden and China, July 2, 1908.

suffered to prosecute their commerce, in quiet, and without molestation or embarrassment." [33]

Full respect is to be paid to the neutrality of foreign ships in Chinese waters in time of war between China and other nations, provided that these ships operate in full accordance with the laws and usages of neutrality.[34] Besides, protection of navigation has been seriously considered by the Chinese government.[35]

With regard to jurisdiction over disputes on board merchant ships, China takes the attitude that the consular officers of the flag State have exclusive charge of the internal order of the merchant ships of their nation, unless the disturbances are of such a nature as to interfere with the peace and public order on shore or in the port, or unless persons not of the crew are involved in the disturbances, or local assistance is requested by the consular officers. This attitude is indicated in the Consular Convention between China and the Netherlands, relative to the Possessions and Colonies of the Netherlands, signed at Peking, May 8, 1911:[36]

"The consuls-general, consuls, vice-consuls or consular agents of China shall have exclusive charge of the internal order of all merchantmen of their nation.

"They alone shall have jurisdiction over all controversies which may have arisen at sea or may arise in port between the captain, the officers and men of the crew, including controversies regarding the adjustment of wages and the execution of contracts.

"The tribunals or other authorities of the possession or colony may not for any reason whatever interfere in these controversies unless they should be of such a nature as to disturb the peace and public order on shore or in the port, unless persons not of the crew take part therein, or unless the consuls-general, consuls, vice-consuls and consular agents request the assistance of the said authorities to carry out their decisions or to uphold their authority." [37]

[33] See also Art. III of the Treaty of Friendship, Commerce, and Navigation between France and China, October 24, 1844; Art. XIII of the Treaty of Commerce between Austria and China, October 19, 1925.

[34] See Art. XXII of the Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, March 20, 1847; Art. VII of the Treaty of Friendship, Commerce, and Navigation between Sweden and China, July 2, 1908.

[35] See the Regulations relating to the Suppression of Brigandage for the Protection of Navigation, promulgated by the Executive *Yuan* on January 6, 1934 (*C.L.C.R./2*, Vol. 8, p. 4843); Art. XXVI of the Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, March 20, 1847; Art. XIII of the Treaty of Peace, Friendship, and Commerce between China and the United States, signed at Tientsin, June 18, 1858 (Hertslet, Vol. 1, No. 94); Art. VII, Par. 2 of the Treaty of Friendship and Commerce between China and the Netherlands, October 6, 1863. See also *infra*, pp. 50-55.

[36] MacMurray, Vol. 1, No. 1911/3.

[37] Art. 14. See also Art. XVIII of the Treaty of Friendship, Commerce, and Navigation between Poland and China, September 18, 1929.

Nevertheless, the intervention of the local authorities may be exercised under necessity even without the request of the consular agents. This was provided for in the Additional Protocol to the Treaty of Friendship, Commerce, and Navigation between Poland and China, September 18, 1929:[38]

"It is understood that the local authorities may only intervene on board a vessel at the request of a consul of the other Contracting Party or of the captain of the ship. Where such action is indispensable and delay may have serious consequences or when a person not forming part of the crew is involved in disturbances occurring on board ship, the authorities may intervene without such request, but the authorities in question shall then be required immediately to inform the nearest consul of the other Contracting Party." [39]

The Sino-Polish Treaty of 1929 is essentially different from the Sino-Dutch Convention of 1911 in that the former stipulates that the local authorities may intervene without request from the consular agents on occasions where such action is indispensable and delay may have serious consequences. Such serious consequences may be limited to the ship and need not necessarily disturb the peace and public order on shore or in the port. In this respect, the local authorities have a discretionary power over the controversies in a foreign ship wider than that provided in the Sino-Dutch Convention of 1911.

The above provisions with regard to disturbances on board ships are not applied to persons landing from foreign ships and causing disturbances on the shore. Such persons may be arrested and punished by the local authorities. Thus the Treaty of Friendship, Commerce, and Navigation between China and Mexico, 1899, provides:

"Persons, of whatever condition they may be, who may land from vessels of one of the High Contracting Parties, at an open port of the other, and cause any disturbance on shore within twenty-four hours of their landing, shall be punished by the proper local authorities, but only with fine or imprisonment in accordance with the usages established at said port." [40]

Deserters from ships are in a different category. The local authorities are obliged to arrest and place them at the disposal of the consular officers of the requesting nation. Article 10 of the Consular Convention between China and the Netherlands, relative to

[38] *League of Nations Treaty Series*, Vol. 120 (1932). pp. 366-367.
[39] Ad Art. XVIII.
[40] Art. XVI, Par. 1.

the Possessions and Colonies of the Netherlands, 1911, reads as follows:

"The consuls-general, consuls, vice-consuls or consular agents may request the assistance of the local authorities for the arrest, detention and imprisonment of deserters of Chinese merchantmen or war vessels. To this end they shall address to the competent authorities a written request for the deserter, and if it is proven by the registers of the vessel, the enrollment list of the crew, or by any authentic document, that the men claimed were part of the crew, the surrender of the deserters may not be refused them, unless the individual in question is a Dutch subject.

"The local authorities shall be obliged to exercise all their power to cause the arrest of the deserters; and after the arrest, the latter shall be placed at the disposal of said consular officers, and they may be detained upon the request and at the expense of those claiming them, to be afterward returned on board the vessels to which they belong or sent on board another vessel of the same nation. But, if these deserters are not returned within four months, reckoned from the date of their arrest, they shall be set free and never again be arrested for the same cause.

"It is understood, however, that the surrender of the deserter who has committed a crime, violation or infraction against the law, shall be withheld until the tribunal of the possessions, colonies or of the mother-country before which the case is to be tried shall have rendered its decision and the latter has been carried out."

IV. Privileges of Foreign Warships

Warships are generally considered as invested with the identity of the State. In foreign territorial and national waters, they are completely exempt from local jurisdiction.[41] By treaty provisions, foreign warships are accorded by the Chinese government various privileges relating to access to Chinese waters and other facilities. Article LII of the Treaty of Peace, Friendship, and Commerce between Great Britain and China, 1858, provides:

"British ships of war coming for no hostile purpose, or being engaged in the pursuit of Pirates, shall be at liberty to visit all ports within the dominions of the Emperor of China, and shall receive every facility for the purchase of provisions, procuring water, and, if occasion require, for the making of repairs. The commanders of such ships shall hold intercourse with the Chinese authorities on terms of equality and courtesy."[42]

[41] For the status of warships and other public vessels, see C. G. Fenwick, *International Law*, pp. 227-230.

[42] See also Art. XXX of the Treaty of Friendship, Commerce, and Navigation between France and China, October 24, 1844; Art. VI, Par. 2 of the Treaty of Commerce, etc., between Russia and China, signed at Tientsin, June 1/13, 1858 (Hertslet, Vol. 1, No. 81); Art. XLVIII of the Treaty of Amity, Commerce, and Navigation between China and Spain, October 10, 1864.

The provision of the Sino-British Treaty of 1858 is unilateral in that it does not accord the same privileges to the Chinese warships in British waters. Reciprocal treatment in respect of such privileges was, however, provided for in several other treaties. The Treaty of Friendship, Commerce, and Navigation between China and Peru, signed at Tientsin, June 26, 1874,[43] is one example. Article X of the Treaty reads:

"The ships of war of each country respectively shall be at liberty to visit all the ports within the territories of the other to which the ships of war of other nations are or may be permitted to come. They shall enjoy every facility, and meet no obstacle in purchasing provisions, coals, procuring water, and making necessary repairs. Such ships shall not be liable to the payment of duties of any kind." [44]

In the Treaty of Friendship, Commerce, and Navigation between Sweden and China, 1908, previous notice before the entering of warships is required.[45]

Because of their identity with the personality of a State, foreign warships in Chinese waters, or *vice versa,* are exempt from the payment of all duties, both on their arrival and departure.[46] This is the general rule of international law. As a measure of reciprocity to the British return of Weihaiwei to China in 1930, some special privileges were given by the Chinese government to British warships when visiting Liukungtao. The Sino-British Agreement of 1930[47] provides:

"Article 3.

"1. His Britannic Majesty's ships and auxiliaries visiting Liukungtao and its waters during the month of April to October, inclusive, will be accorded the use, after the Chinese Navy, of that portion of the anchorage that has been dredged by His Britannic Majesty's Navy. Nevertheless, in the event of war involving either His Britannic Majesty or the Chinese Republic, His Britannic Majesty's ships or auxiliaries shall withdraw from Liukungtao water, in accordance with international usage.

[43] Hertslet, Vol. 1, No. 71.

[44] See also Art. IX of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, December 14, 1899.

[45] Art. VIII.

[46] See Art. XXIX of the Treaty of Friendship, Commerce, and Navigation between China and France, June 27, 1858; Art. IX, Par. 3 of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, December 14, 1899. Art. VIII, Par. 2 of the Treaty of Friendship, Commerce and Navigation between Sweden and China, July 2, 1908.

[47] See the Convention between Great Britain and China for the Rendition of Weihaiwei and Agreement regarding Certain Facilities for British Navy after Rendition, signed at Nanking, April 18, 1930 (*League of Nations Treaty Series,* Vol. 112 (1931), pp. 50-63).

"2. Ships of His Britannic Majesty's Navy will be accorded the privilege of towing targets from the aforementioned anchorage to the sea, reasonable care being taken to avoid damage to fishing nets.

"3. During the period of the loan to the Government of the United Kingdom of a certain number of buildings and facilities on Liukungtao, as stated in Article 1 of the present agreement, His Britannic Majesty's Navy will be accorded the privilege of landing men for drill or rifle practice on Liukungtao after obtaining permission from the Chinese authorities, which will be given on application, to be renewed yearly. In the event of local disturbances occurring, such privileges may be temporarily foregone on representations being made by the local authorities.

"Article 4.

"The importing, storing, shipping and transhipping at Weihaiwei of stores of all kinds for the purposes of His Britannic Majesty's Navy will be permitted according to the usage of the ports open to foreign trade. The Government of the United Kingdom will not store arms or ammunition on Liukungtao.

"Article 5.

"Existing buoys and moorings that have been laid by His Britannic Majesty's Navy in Weihaiwei waters shall be transferred, free of charge to, and maintained by, the National Government of the Republic of China for the use of His Britannic Majesty's Navy after the Chinese Navy. All these buoys and moorings, however, may be removed from time to time as the Chinese naval or harbour authorities may deem expedient."

The privileges accorded to the British Navy by this agreement are not given to warships of other nations. Hence this case is extraordinary, and cannot be taken as the general attitude of the Chinese government toward foreign warships.

In a recent treaty concluded between Poland and China, September 18, 1929, warships of one of the Contracting Parties may not, without special permission, enter the territorial seas or roadsteads, bays, or ports of the other. This does not, however, mean that temporary entering under *force majeure* shall not be admitted. On the contrary, the local authorities are obliged to give aid to such warships encountering rough weather or sailing astray. Thus Article XVII of the Sino-Polish Treaty of 1929 provides:

"Warships and merchant ships conveying troops and war material of one of the Two Contracting Parties may not, save with special permission of the Government of the other Party, enter its territorial seas or its roadsteads, bays or ports. Should such vessels run aground or encounter rough weather or other dangers near the coasts of the other Contracting Party, the local

authorities shall give them aid and assistance in accordance with international usage."

In the Treaty of Commerce between Austria and China, 1925, the following clause was embodied:

"If a man-of-war or a ship of one of the Contracting Parties should founder or lose her way along the coast of the other, the local authorities shall give immediate notice to the nearest competent consul and shall render on the spot all aid and assistance necessary for the rescue, in accordance with the practice of international public law."[48]

V. Collisions at Sea, Shipwreck, and Salvage

In February, 1930, the Executive *Yuan* promulgated the Regulations concerning Collisions at Sea.[49] These Regulations prescribe means to avoid collisions as well as signals for salvage, and are applicable to all cases occurring on the high seas or in the Chinese maritime belt.[50] Inasmuch as there is no rule of international law regulating the jurisdiction of collisions at sea, each State has the right to make its own laws with respect to this matter.[51] The Code of Maritime Commerce, 1929, provides that Chinese courts may detain at whatever time any ship which has done injury to Chinese ships or nationals in collisions at whatever place and which is in Chinese territorial or national waters, and that the detained ship may be released under appropriate security.[52]

In 1933, the Ministry of Communications instituted a commission, whose function is to settle the controversies arising out of collisions.[53] There is no special law regulating the respective powers of the courts and the administrative branch over cases of collisions at sea, but according to a Decree issued by the Ministry of Justice on July 25, 1932, the jurisdiction over cases of violation of the Laws relating to Ships is with either the courts or the administrative branch, depending upon the nature of the case, whether involving criminal or administrative offences, respectively.[54] Whether or not

[48] Art. XIV, Par. 2.

[49] *C.L.C.R./2*, Vol. 8, pp. 4837-4842.

[50] See the Preamble of the Regulations.

[51] For the practices of different States, see L. Oppenheim, *International Law*, Vol. 1 pp. 480-481.

[52] See Art. 119. For details of collisions, see Arts. 113-120.

[53] For the Regulations relating to the Commission, promulgated by the Ministry of Communications on April 28, 1933, see *C.L.C.R./2*, Vol. 8, p. 4842.

[54] See *The Collected Laws of the Chinese Republic*, Chung Hwa Press, 1934 (hereafter cited as *C.L.C.R./1*), Vol. 8, pp. 613-614.

this interpretation may be applied to cases of collisions at sea can not be definitely concluded.

Conflicts of jurisdiction of different States over cases of collisions at sea are unavoidable. The attitude of the Chinese government in this respect can be shown by the Treaty of Friendship, Commerce, and Navigation between China and Mexico, 1899. Article XVI of the Treaty reads in part:

"The questions arising from Collisions in Chinese waters between vessels of the two countries shall be decided by the authorities of the accused, in accordance with the legal regulations in force in all countries respecting collisions.

"Should the complainant not be satisfied with the decision, the Agents of the country to which he belongs shall be authorized to apply officially to the authorities that have tried the offender, and they shall retry the case and give a final and equitable decision on the same." [55]

Assistance to ships encountering shipwreck or stress of weather has been provided in various treaties concluded between China and other nations. Such ships may take refuge in any port, whether open or non-open, and the local authorities are required to give every possible aid for the salvage of the ships, persons, and cargoes. Article XX of the Treaty of Peace, Friendship, and Commerce between Great Britain and China, 1858, reads:

"If any British vessel be at any time wrecked or stranded on the coast of China, or be compelled to take refuge in any port within the dominions of the Emperor of China, the Chinese authorities, on being apprised of the fact, shall immediately adopt measures for its relief and security; the persons on board shall receive friendly treatment, and shall be furnished, if necessary, with the means of conveyance to the nearest Consular station."

The Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, 1847, provides more fully in this respect:

"If any Swedish or Norwegian vessel shall be wrecked or stranded on the coast of China and be subjected to plunder or other damage, the proper officers of Government, on receiving information of the fact, will immediately adopt measures for their relief and security, and the persons on board shall receive friendly treatment and be enabled at once to repair to the most convenient of the free ports, and shall enjoy all facilities for obtaining supplies of provisions and water. And if a vessel shall be forced in whatever way to take refuge in any port other than one of the free ports, then in like manner

[55] Pars. 2, 3.

the persons on board shall receive friendly treatment and the means of safety and security." [56]

In addition to agreeing to these treaty provisions, the Chinese government has enacted laws regulating salvage. According to Article 121 of the Code of Maritime Commerce, 1929, the captain of a ship is expected to use all possible efforts to effect the salvage provided only that there is no imminent danger to his own ship and the persons on board. Failure on his part makes him subject to a penalty of three years imprisonment.

The merchandise saved or landed on shore to facilitate the repair of the damaged ship is not subject to the payment of duties,[57] but the ship must pay dues on the merchandise sold for whatever purpose, in accordance with the laws and regulations of the locality.[58] At the same time, any unlawful trading in the port is forbidden on pain of confiscation of ship and cargo.[59]

VI. Suppression of Piracy

Piracy, in its general meaning, may be defined as "every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the

[56] Art. XXVII. See also Art. XXX of the Treaty of Friendship, Commerce, and Navigation between France and China, October 24, 1844; Art. VI of the Treaty of Commerce, etc., between Russia and China, June 1/13, 1858; Art. XIII of the Treaty of Peace, Friendship, and Commerce between China and the United States, June 18, 1858; Arts. VII and XII of the Treaty of Friendship and Commerce between China and the Netherlands, October 6, 1863; Art. XVII of the Treaty of Commerce and Navigation between China and Japan, July 21, 1896; Art. X, Par. 3 of the Treaty of Amity and Commerce between Corea and China, September 11, 1899; Art. XVI of the Treaty of Friendship, Commerce, and Navigation between Poland and China, September 18, 1929.

[57] See Art. XI, Par. 3 of the Treaty of Friendship, Commerce, and Navigation between China and Peru, June 26, 1874; Art. XVII of the Treaty of Commerce and Navigation between China and Japan, July 21, 1896; Art. XI of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, December 14, 1899; Art. VI, Par. 5 of the Treaty of Friendship, Commerce, and Navigation between Sweden and China, July 2, 1908; Art. XIV, Par. 1 of the Treaty of Commerce between Austria and China, October 19, 1925.

[58] See Art. XI, Par. 3 of the Treaty of Friendship, Commerce, and Navigation between China and Peru, June 26, 1874; Art. XI, Par. 2 of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, December 14, 1899; Art. VI, Par. 5 of the Treaty of Friendship, Commerce, and Navigation between Sweden and China, July 2, 1908; Art. 9, Par. 4 of the Consular Convention between China and the Netherlands, relative to the Possessions and Colonies of the Netherlands, May 8, 1911; Art. XIV, Par. 1 of the Treaty of Commerce between Austria and China, October 19, 1925; Art. XVI, Par. 2 of the Treaty of Friendship, Commerce, and Navigation between Poland and China, September 18, 1929.

[59] See, for example, Art. XII, Par. 2 of the Treaty of Friendship and Commerce between China and the Netherlands, October 6, 1863.

mutinous crew or passengers against their own vessel."[60] The important features of piracy are: (1) it is associated with ships, (2) it is committed on the high seas, and (3) it usually but not always involves the intent to plunder (*animo furandi*). By an unauthorised act of violence, a pirate and his vessel lose *ipso facto* the national character and protection of the State under whose flag the ship sails. Therefore "the vessels of all nations," as Oppenheim remarks, "whether men-of-war, other public vessels, or merchant-men, can on the open sea chase, attack, and seize the pirate, and bring him home for trial and punishment by the courts of their own country."[61] Although under general international practice the punishment of pirates has been capital, it is within the competence of the different States to stipulate whatever punishment they see fit.

During the middle of the nineteenth century, pirates did much to menace navigation on the high seas near the Chinese coast. Co-operative measures were taken by Great Britain, Germany, and the United States, together with China, to suppress them.[62] China, like other nations, considered the pirates enemies of mankind. According to the provisions of the Imperial Code of Penal Laws (*Ta Ch'ing Leu Lee*), the penalty imposed upon pirates was death by beheading, and one who bought plunder from them was punishable with flogging and transportation.[63] Various treaties were concluded between China and other nations providing for the suppression of pirates. For example, Article LIII of the Treaty of Peace, Friendship, and Commerce between Great Britain and China, 1858, reads:

> "In consideration of the injury sustained by native and foreign commerce from the prevalence of Piracy in the seas of China, the High Contracting Parties agree to concert measures for its suppression."

By the same Treaty, British warships in pursuit of pirates were declared to be at liberty to visit all ports within the dominion of China and were to receive all necessary facilities in aid of this purpose.[64]

[60] L. Oppenheim, *op. cit.*, Vol. 1, p. 486. *Cf.* W. E. Hall, *A Treatise on International Law*, Sec. 81; T. J. Lawrence, *The Principles of International Law*, Sec. 102.

[61] L. Oppenheim, *op. cit.*, Vol. 1, p. 491.

[62] See *U. S. For. Rel.*, 1866, Pt. I, pp. 224, 227, 228, 486, 492, 506, 511, 519; 1870, pp. 329, 330, 331, 334.

[63] See *Harvard Research in International Law*, V. Piracy Laws of Various Countries, p. 952.

[64] See Art. LII.

The term piracy was improperly used in the treaties concluded between China and foreign nations. According to these treaty provisions, unauthorised acts of violence occurring in waters under Chinese jurisdiction were also regarded as piracy, and the Chinese government was held to be responsible. If the local authorities failed to seize the guilty parties, they were to be subject to punishment according to Chinese law. For example, the Treaty of Friendship, Commerce, and Navigation between Denmark and China, signed at Tientsin, July 13, 1863,[65] provides:

"If any Danish merchant vessel, while within Chinese waters, be plundered by robbers or Pirates, it shall be the duty of the Chinese authorities to use every endeavor to capture and punish the said robbers or Pirates, and to recover the stolen property, that it may be handed over to the Consul for restoration to the owner.

"But if the authority whose charge it is shall fail to seize the guilty parties and recover the stolen property, all that can be required of the Chinese Government is that it shall punish the said authority according to the laws of China; it is not to indemnify the persons robbed." [66]

Similar clauses were embodied in many other treaties.[67] In spite of the heavy responsibility imposed upon the local authorities in connection with piratical cases, the Chinese government was not required to indemnify for the goods lost. The reason for this was explained in the Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, 1847, Article XXVI of which reads in part:

". . . But if Swedish or Norwegian merchant-vessels while within the waters over which the Chinese Government exercises jurisdiction, be plundered by robbers or pirates, then the Chinese local authorities, civil and military, on receiving information thereof, will arrest the said robbers or pirates, and punish them according to law, and will cause all the property which can be recovered to be placed in the hands of the nearest consul, or other officer of the United Kingdoms of Sweden and Norway, to be by him restored to the true owner. But if by reason of the extent of territory and numerous

[65] Hertslet, Vol. 1, No. 38.

[66] Art. XIX.

[67] See Art. XXIX of the Treaty of Friendship, Commerce, and Navigation between France and China, October 24, 1844; Art. XXVI of the Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, March 20, 1847; Art. IX of the Treaty of Peace, Friendship, and Commerce between China and the United States, June 18, 1858; Art. XXXIV of the Treaty of Friendship, Commerce and Navigation between China and France, June 27, 1858; Art. XVI of the Treaty of Amity, Commerce and Navigation between China and Spain, October 10, 1864; Art. XIX of the Treaty of Commerce and Navigation between China and Japan, July 21, 1896.

population of China it should in any case happen that the robbers cannot be apprehended, or the property only in part recovered, then the law will take its course in regard to the local authorities, but the Chinese Government will not make indemnity for the goods lost."

However, if the local authorities were proved to be in collusion with the pirates, their property was subject to confiscation to repay the losses, as provided in the Treaty of Peace, Friendship, and Commerce between China and the United States, 1858. The following is an excerpt from Article XIII of the Treaty:

". . . If the merchant-vessels of the United States, while within the waters over which the Chinese Government exercises jurisdiction, be plundered by robbers or pirates, then the Chinese local authorities, civil and military, on receiving information thereof, shall arrest the said robbers or pirates, and punish them according to law, and shall cause all the property which can be recovered to be restored to the owners or placed in the hands of the Consul. If, by reason of the extent of territory and numerous population of China, it shall in any case happen that the robbers cannot be apprehended, and the property only in part recovered, the Chinese Government shall not make indemnity for the goods lost; but, if it shall be proved that the local authorities have been in collusion with the robbers, the same shall be communicated to the superior authorities for memorializing the Throne, and these officers shall be severely punished, and their property be confiscated to repay the losses."

Evidently, in these treaty provisions, the words 'robbers' and 'piracy' were used interchangeably. Unauthorised acts committed in Chinese waters were also called piracy. This usage is contradictory to the general definition of piracy, an important feature of which is that it must be committed on the high seas. As piracy is an international crime and the persons committing the act of piracy lose *ipso facto* their national character and therefore protection of their original State, every State has the right as well as the duty to suppress piracy, but no State should be charged with chief responsibility.

In this connection, the case of the *Caldera* may well be noted. On October 5, 1854, the *Caldera,* a Chilean bark of 574 tons, sailed from Hongkong for San Francisco. Through stress of weather, she was compelled, on October 7, to put into a bay off the islands of Koe-lan and Choo-koo-me where she was plundered by several separate Chinese piratical bands. A claim for indemnity was made by several agents of the American underwriters, by whom the hull of the *Caldera* and the larger part of her cargo were insured. Two

commissioners were appointed by the American government to investigate the case. The decision of Commissioner Roberts was favorable to the claimants and upheld by the American government;[68] but the reasonableness of the decision was widely questioned. The following is an extract from the dissenting opinion of Commissioner Bradley who rejected the claim *in toto*:

"In view of the facts herein set forth, I cannot perceive that the government of China has failed to carry out its treaty obligations in the protection of American interests against piracy to the best of its ability; and as 'a treaty is the law of the land, its provisions must be regarded by courts as equivalent to an act of the legislature, when it operates directly on a subject,' as here. (Foster *vs.* Neilson, Peters, VIII, 188.)

"A decision in favor of the claimants would be unprecedented. The case of Messrs. Nott & Co., asking for indemnity for loss of treasure shipped per Neva, at Hong-Kong, and taken by pirates on the coast, in October, 1857, (a case, in every material point, precisely similar to that of the Caldera,) has been already rejected by the board; and it is not easy to discover any good reason why the one should be refused and the other allowed. Numerous like instances have, within the last seventeen years, occurred in the waters over which China exercises jurisdiction, for which neither British nor American underwriters have ever asked indemnity. 'Insurers are presumed to know the state and incidents of the trade in which property covered by them is represented to be embarked. * * * They ask no questions, propose their premiums, and the contract is as well understood as the most thorough investigation can make it.'—(Back *vs.* the Chesapeake Insurance Company, Wheaton, VII, 508.) Piracy is one of the risks against which they insure; and it would be as reasonable to insist on Chinese indemnity for losses occasioned by Chinese typhoons as for those by Chinese pirates; and the award which the plaintiffs seek would, if allowed, constitute such a precedent as would involve the governments of the United States and China in perpetual disputes. That 'it is dangerous to introduce new and dangerous things,' is a sound maxim of the common law.

"That a portion, at least, of the underwriters of the Caldera think her a bad subject for indemnification, might be inferred from the fact that they have parted with their interests in the ship and cargo, for 'a valuable consideration,' and have thus thrown them into hands speculating on recovery.

"My opinion is, that the parties interested in the case of the Caldera are entitled to no award, either on principles of usage, equity, or of international law." [69]

Notwithstanding the award and its payment of $54,566.14, the underwriters in 1863 resubmitted their claim to Mr. Burlingame,

[68] For details, see 40th Cong., 3rd Sess., Executive Doc., No. 29 (1868-1869). For a brief review of the case, see *U. S. For. Rel.*, 1886, pp. 146-147.

[69] 40th Cong., 3rd Sess., Executive Doc., No. 29 (1868-1869), p. 176.

American minister to Peking, asking for a further sum of $68,078.67. After making an exhaustive review of the case, Mr. Burlingame transmitted his opinion to the Secretary of State with the following conclusion:

"From these facts it appears that the claim was fully considered and decided under the most favorable circumstances for the claimants, who received two-thirds of the sum originally claimed, when, it seems to me, they were not entitled to one farthing. I agree entirely with the able opinion of Dr. Bradley against the whole claim, and also with the antecedent opinion of Minister McLane, in November, 1854, in the same sense. * * * After this award, to learn that a still further claim should be put forward fills me with amazement." [70]

Despite this, the Chinese government has tried its best to suppress the pirates. In addition to the provisions of the Imperial Code of Penal Laws, treaties were concluded with several countries to the effect that the latter should be restrained from sending munitions and supplies to the pirates. This is a preventive measure against any foreign complication in piracy. The Treaty of Amity, Commerce, and Navigation between China and Spain, 1864, for example, provides:

"No Spanish merchant or vessel may carry to rebels or pirates any kind of provisions, arms, or munitions of war.

"In case of contravention, the vessel and her cargo shall be confiscated, and the offender shall be delivered up to the Spanish Government to be punished with the utmost severity of the law." [71]

Shortly after the establishment of the Republic, the Chinese government, on March 10, 1912, promulgated the Provisional Criminal Code, which provided that whoever should commit robbery on the sea (or under certain special circumstances) should be punished with death or imprisonment for a term no longer than that provided for ordinary robbery.[72] This Provisional Criminal Code was later replaced by the Criminal Code promulgated on March 10, 1928,[73] which was, in turn, superseded by that promulgated on January 1, 1935.[74] Substantially there is almost no

[70] *U. S. For. Rel.*, 1865, Pt. 2, p. 408.

[71] Art. XLIX. See also Art. II, Par. 2 of the Treaty of Friendship and Commerce between China and the Netherlands, October 6, 1863.

[72] See *Harvard Research in International Law*, V. Piracy Laws of Various Countries, p. 952.

[73] For its text, see *C.L.C.R.*/2, Vol. 1, pp. 155-173.

[74] For its text, see *ibid.*, Vol. 1, pp. 137-155. On November 18, 1927, a special law for the suppression of brigandage was promulgated, and under that law piracy was punishable. See *Harvard Research in International Law*, V. Piracy Laws of Various Countries, pp. 952-953.

difference between the two codes regarding the punishment of piracy.[75] According to the present Code, the offence of piracy and its punishment are defined as follows:

"Whoever navigates any vessel it not being commissioned by a belligerent State nor being part of the naval forces of any State, with intent to employ threats or violence against other vessels, or the company or cargo of other vessels, commits the offence of piracy and shall be punished with death, with imprisonment for life or with imprisonment for not less than seven years. The individual who, being a member of the crew of a vessel, or a passenger on board a vessel, with intent to seize money or goods, employs threats or violence against another member of the crew or a passenger on board, and navigates or takes command of the vessel, shall be deemed guilty of piracy.

"If the death of any person has resulted from the commission of the above offences, the offender shall be punished with death; if serious bodily injury has resulted, the offender shall be punished with death or imprisonment for life." [76]

The death penalty shall be imposed upon a pirate who commits any one of the following offences: arson, rape, kidnapping persons for ransom, or voluntary homicide.[77]

[75] See the present Code, Pt. I, Ch. I, Art. 5, No. 7; Pt. II, Ch. XXIX, Arts. 333, 334; the Code of 1928, Pt. I, Ch. I, Art. 5, No. 5; Pt. II, Ch. XXIX, Arts. 352, 353.

[76] Criminal Code of 1935, Pt. II, Ch. XXIX, Art. 333.

[77] See *ibid.*, Pt. II, Ch. XXIX, Art. 334.

CHAPTER III

JURISDICTION OVER PERSONS[1]

I. Reception of Aliens

ALTHOUGH OPINIONS are not unanimous among the jurists concerning the obligation of a State to admit aliens into its territory, no State actually excludes aliens altogether.[2] The Chinese government, with the exception of the latter Manchu regime, has been traditionally liberal in receiving aliens. It is an unfortunate misconception among many Westerners that China had a policy of absolute seclusion and extreme contempt for foreign countries and their people. In order to eradicate this deeply rooted misconception, a brief review of China's traditional attitude in this respect is both necessary and instructive.

It is true that until the middle of the nineteenth century China was and had long been in the position of maintaining a state of hegemony over the Asiatic mainland, and that her early development and achievement of a highly advanced civilization beyond that of any other country in the Far East led the Chinese to hold the idea of racial superiority and national supremacy. Confucius strongly advocated respect for the Chinese Emperor and subjugation of aliens. His principle, as clearly indicated in his master Work, *Ch'un Ch'iu* or *The Annals of the Spring and Autumn,* was closely adhered to by his followers. "I have heard that aliens are assimilated into Chinese," said Mencius, "but I have never heard that Chinese are assimilated into aliens."[3] Such an attitude can be traced even as far back as Emperor Shun and Emperor Yü, more than twenty-two centuries B.C.[4]

[1] Persons are normally not subjects but objects of international law. It is through the medium of nationality that persons are entitled to the rights and obligated to the duties of international law. See L. Oppenheim, *International Law,* Vol. I, Secs. 288-292.

[2] See *ibid.,* Vol. I, Sec. 314.

[3] *The Thirteen Classics,* Works of Mencius, p. 31.

[4] Their statements can be found in the *Shu King,* one of the so-called Five Classics.

Nevertheless, a careful examination of early Chinese history shows that China did pay great respect to those foreign countries whose civilization was highly developed. The following is a description of the Roman Empire and its people as recorded in *The History of the Later Han*:

"The country of Ta Ts'in is also called Li-chuin. The people are tall, well-proportioned and like Chinese. The country contains much gold, silver and precious stones. They traffic by sea with Anhsi and India. Their kings always wanted to send embassies to China, and the Anhsi wished to trade with them in Chinese silk, and it is for this reason that they were cut away from communication with China. During the reign of Emperor Yen-hsi, the king of Ta Ts'in sent an embassy, who from the frontier of Annam offered ivory, tortoise shell, and intercourse began." [5]

The Chinese word 'ta' means 'great', and 'Ts'in' was the title of a reigning dynasty (225-206 B.C.) whose first Emperor united all of China after centuries of the feudal system and civil wars among the semi-independent States during the Chou dynasty (1122-249 B.C.).[6] The term 'Ta-Ts'in' would never be used by the Chinese, unless they thought that the Romans were highly civilized and a respect-worthy people. The same attitude was taken by the Hans toward India.[7] From the time of Emperor Ming-ti (A.D. 58-75), who sent envoys to India or T'ien Chu to search for Buddhist classics, intercourse between the two countries became quite frequent and India was even regarded by some of the Chinese as a Sacred Place.

During the Tang dynasty (618-906), cross-fertilization of culture was emphasized and aliens from different countries were well received. More than 657 new Sanskrit books were brought to China from India,[8] and Chinese civilization was thenceforth greatly influenced by Buddhism. Meanwhile Japanese students, Buddhists, and envoys poured into Chang-an, capital of the Tang and several other Chinese dynasties.[9] The Nestorian missionaries, who were then allowed to preach and practice the Christian religion in China, were respected by both officials and people. The Arabs, Indians,

[5] Quoted from Wu Hung-chu, "China's Attitude towards Foreign Nations and Nationals Historically Considered," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 10 (1926), No. 1, p. 22.

[6] The famous Great Wall was built by the first Emperor of the Ts'in dynasty to defend China's north part from foreign invasion.

[7] The Han dynasty ruled China during the period, 206 B.C.-A.D. 221.

[8] Yuan Tsung, a celebrated monk, was sent to India to collect the Buddhist books, which were later translated into Chinese.

[9] Chang-an is now named Sian, capital of the Shensi province.

Persians, and Romans traded in Chinese ports with complete freedom.[10]

The Yuan dynasty (1280-1367) was very kind to aliens, Marco Polo, for example, being appointed governor of a district. Missionary work was tolerated. About 1322, Friar Jordanus, the Dominican, having been persecuted near Bombay, came to China. Zaytun (Chwanchow) became the headquarters of the Franciscan convents.[11] During the Ming dynasty (1368-1644), the Jesuits were permitted to come to China and freely spread Christianity.[12] For almost three decades (1517-1545), the Portuguese merchants could trade freely with the Chinese people in three designated ports.[13]

Perhaps the Western misunderstanding of the Chinese attitude toward aliens was largely due to the customary inappropriate translation of the word 'yi' into 'barbarians'. The word 'yi' in Chinese simply means 'foreign country' and hence applies to its people.[14] It is true that almost all the neighboring countries of ancient China were peopled by barbarians who were held in contempt by the civilized Chinese, yet the two terms are by no means identical. Another cause of the misunderstanding was probably the fact that the Manchu Court in the later period of the Ch'ing dynasty (1644-1911) had the misconception that the people from Western countries were not so civilized as the Chinese, and hence did not treat them as equals. The foreign displeasure with the Chinese application of the word 'yi' to aliens is evidenced in the Treaty of Peace, Friendship, and Commerce between Great Britain and China, signed at Tientsin, June 26, 1858.[15] Article LI of the Treaty reads:

"It is agreed, that henceforth the character 'I' shall not be applied to the Government or subjects of Her Britannic Majesty in any Chinese official

[10] See Wu Hung-chu, *op. cit.*, p. 27.

[11] See Henry Yule, *Cathay and the Way Thither*, Vol. 1, p. 171.

[12] In 1605, there were more than two hundred converts in Peking.

[13] See Chang Teh-ch'ang, "Maritime Trade at Canton during the Ming Dynasty," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 17 (1933-34), No. 2, pp. 264-282. For various reasons, public indignation against the Portuguese arose. Consequently Macao was the only port open for their trade.

[14] According to *Tsou Yuan*, a standard Chinese dictionary, the word 'yi' may be used in either one of the following meanings: (*a*) safe; (*b*) pleasant; (*c*) class; (*d*) hurt; (*e*) great; (*f*) extinguish; (*g*) exhibit; (*h*) normalcy; and (*i*) east, designating foreign countries in the East, and hence broadened to mean foreign countries. Accordingly, the word 'yi', in its original sense, does not mean 'barbarians' at all.

[15] Hertslet, Vol. 1, No. 6.

document issued by the Chinese authorities in the capital or in the provinces." [16]

After the Opium War (1840-42), events took a sharp turn. Submitting to one defeat after another, China had to cede her dependencies, open her ports to foreign trade, pay heavy indemnities, and, above all, involuntarily conclude many unequal treaties dictated by the victors.[17] As a result of these humiliations, fear and hatred characterized the attitude of the Chinese people toward aliens at the end of the Ch'ing dynasty. With the establishment of the Republic, however, the Chinese government has taken an enlightened and liberal attitude in receiving foreign nationals, and has never imposed any harsh restrictions upon their immigration.

By municipal laws and treaty provisions,[18] foreign nationals entering Chinese territory are required to carry passports issued by the competent authorities of their respective States, attesting their nationality and the object of their journey, unless they are under

[16] Here 'I' should be 'ɪ' according to the Chinese mandarin

[17] For a summarized review of the diplomatic history of China, see M. J. Bau, *The Foreign Relations of China*, Pt I, the present writer's *Imperialism and China*, Pt II

[18] For the treaty provisions, see, for example, Art. IX of the Treaty of Peace, Friendship, and Commerce between Great Britain and China, June 26, 1858, Art VIII of the Treaty of Friendship, Commerce, and Navigation between China and France, signed at Tientsin, June 27, 1858 (Hertslet, Vol 1, No 40); Art VII of the Treaty of Amity, Commerce, and Navigation between China and Spain, signed at Tientsin, October 10, 1864 (*Ibid.*, Vol. 1, No. 91); Art V of the Treaty of Friendship, Commerce, and Navigation between China and Peru, signed at Tientsin, June 26, 1874 (*Ibid.*, Vol 1, No 71); Art XIV of the Convention between Great Britain and China, giving Effect to Article 3 of the Convention of July 24, 1886, relative to Burmah and Tibet, signed at London, March 1, 1894 (MacMurray, Vol. 1, No. 1894/1); Art. VI of the Treaty of Commerce and Navigation between China and Japan, signed at Peking, July 21, 1896 (Hertslet, Vol. 1, No. 64); Art. IV of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, signed at Washington, December 14, 1899 (Hertslet, Vol. 1, No. 69); Art. IX of the Treaty of Friendship, Commerce, and Navigation between Sweden and China, signed at Peking, July 2, 1908 (MacMurray, Vol. 1, 1908/11); No. 6 of the Resolutions adopted by the Conference between Russia and China concerning Questions of Commerce and Return of Russian Soldiers and Refugees, held at Ili, May 27, 1920 (*Supplement to MacMurray's Treaties*, pp. 23-25), Art. 7 of the Agreement between Mexico and China for the Provisional Modification of the Sino-Mexican Treaty of 1899, signed at Mexico, September 26, 1921 (*League of Nations Treaty Series*, Vol. 13 (1922), pp. 202-208); Art. III of the Treaty of Commerce between Austria and China, signed at Vienna, October 19, 1925 (*Supplement to MacMurray's Treaties*, pp. 165-169); Final Protocol, Declaration 1 to Art. IV of the Treaty of Friendship, Commerce, and Navigation between Poland and China, signed at Nanking, September 18, 1929 (*League of Nations Treaty Series*, Vol. 120 (1932), pp. 360-366); Art. IV of the Treaty of Amity and Commerce between China and Czechoslovakia, February 12, 1930.

some special provisions of laws or treaties regulating otherwise.[19] According to the Rules governing the Examination of the Passports of Alien Immigrants, promulgated by the National Government on August 22, 1930,[20] an alien is not allowed to enter into Chinese territory if he is:

(1) Without passport or unwilling to present his passport for examination;

(2) With illegal or false passport ;

(3) Likely to do anything against the Nationalist regime or public order;

(4) A wandering beggar;

(5) Bringing in forbidden goods or those detrimental to public morality; or

(6) Having been previously expelled.[21]

On the same date, the National Government promulgated the Administrative Regulations for the Enforcement of the Rules governing the Examination of the Passports of Alien Immigrants.[22] Under these Administrative Regulations, local officials are to detain any alien who enters Chinese territory under either one of the above conditions and to ask instructions from the higher authorities for his disposal.[23] If an alien so detained is unable to leave China because of financial difficulty, he must be sent to the nearest consulate of his country.[24] Generally the passport of an alien immigrant is examined at his first entering port or city; but it is to be examined at the landing place if he comes to China by airplane.[25] The

[19] See the Circular Instruction sent by the Ministry of Foreign Affairs to the Provincial Government in May, 1930 (*C.L.C.R.*/1, Vol. 4, p. 504). For exceptions, see Exchange of Notes between the Chinese Minister of Foreign Affairs and the Japanese Chargé d'Affaires at Peking, concerning the Exemption of Chinese Citizens from Japanese Passport Requirements, January 26 and 29, 1918 (MacMurray, Vol. 2, No. 1918/3); Art. IV[1] of the Convention concerning the Relations between China and France with regard to French Indo-China and the Adjacent Chinese Provinces, signed at Nanking, May 16, 1930 (*League of Nations Treaty Series*, Vol. 162 (1936), pp. 147-149).

[20] *C.L.C.R.*/1, Vol. 4, pp. 500-501.

[21] See Art. 4. This article is also applicable to those aliens who are not required to have passports according to special provisions of laws or treaties.

[22] For its text, see *C.L.C.R.*/1, Vol. 4, pp. 503-504.

[23] See Art. 7; Communication sent by the Ministry of Interior to the Kiangsu Provincial Government in February, 1931 (*Ibid.*, Vol. 4, pp. 502-503).

[24] Art. 4 of the Administrative Regulations of 1930.

[25] See Art. 3.

Bureau of International Affairs of the Ministry of Foreign Affairs takes charge of the matters of incoming and outgoing of aliens.[26]

II. Protection of Aliens in China and Responsibility for Damages done to Their Persons and Properties

After receiving aliens, a State should afford due protection to their persons and properities. Unless there are special provisions in treaties or municipal law, aliens in a State are entitled to the same degree and kind of protection as its nationals. The Chinese government has fully recognized this principle. Usually the rights and duties are prescribed in various treaties which China has concluded with other nations.[27]

[26] See Art. 8, No. 6 of the Organic Law of the Ministry of Foreign Affairs, February 21, 1931.

[27] The typical example is the Treaty of Amity and Commerce between China and Czechoslovakia, signed at Nanking, February 12, 1930 (*League of Nations Treaty Series*, Vol. 110 (1931), pp. 286-306). The following is an excerpt from the Treaty:

"The nationals of each of the High Contracting Parties shall enjoy, in the territory of the other, the full protection of the laws and regulations of the country in regard to their persons and property. They shall have the right, subject to the laws and regulations of the country, to travel, reside, establish firms, acquire or lease property, work, and engage in industry or commerce in all the localities where the nationals of any other country shall be permitted to do so and in the same manner and under the same conditions as the nationals of any other country." (Art. V.)

"The nationals of each of the High Contracting Parties as well as their property, in the territory of the other, shall be subject to the laws and regulations of the country and to the jurisdiction of its own courts.

"In legal proceedings the nationals of each of the High Contracting Parties in the territory of the other shall have free and easy access to the courts and be at liberty to employ lawyers or representatives in accordance with the laws of the country, and interpreters, if necessary, may be called in by the courts for assistance." (Art. VI.)

"The nationals of each of the High Contracting Parties in the territory of the other shall pay taxes, imposts, and charges in accordance with the laws and regulations of the country. It is, however, understood that such taxes, imposts, and charges shall not be other or higher than those paid by the nationals of the country." (Art. VII.)

"The nationals of each of the High Contracting Parties shall be exempt, in the territory of the other, from all compulsory military service, whether in the army, navy, air forces, national guard, or militia, as well as from all taxes, requisitions, prestations, forced loans, or contributions of whatever nature, imposed in lieu of personal service." (Art. IX.)

"The Government of neither of the High Contracting Parties shall subject the nationals of the other to any personal or domicilary search except in accordance with laws and regulations in force." (Art. X.)

"The nationals of each of the High Contracting Parties shall, subject to the laws and regulations of the country, have the right freely to dispose of their private property in the territory of the other, either by will or otherwise." (Art. XI, Par. 1.)

"The nationals of neither of the High Contracting Parties shall be compelled under any pretext whatever to pay within the territory of the other Party any duties, internal charges

The doctrine of responsibility of States for any international delinquency, due to an act of commission or omission, is "a quality of every State as an International Person, without which the Family of Nations could not peacefully exist."[28] An injured alien must, however, first resort to judicial remedies.[29] If there is a clear denial or a gross perversion of justice,[30] his own State may intervene diplomatically in his behalf.[31]

The Chinese government has always acknowledged its responsibility for damages done to the persons and properties of aliens residing in its territory. However, because of the existence of

or taxes upon their importations and exportations other or higher than those paid by nationals of the country or by nationals of any other country." (Art. XII, Par. 3)

"The High Contracting Parties agree that the stipulations contained in the present Treaty which relate to the rights and obligations of the nationals of each of the High Contracting Parties shall also apply to juristic persons recognized as such by the laws of the other except where the rights and obligations involved are of such nature that they are applicable to natural persons only." (Art. XVIII.)

This Treaty was concluded on the basis of equality. In some provisions of the early treaties, foreign nations are entitled to enjoy the right of extraterritoriality in China.

For the status of aliens residing in China, see V. K. Wellington Koo, *The Status of Aliens in China* (1912), W. W. Willoughby, *Foreign Rights and Interests in China*, Vol. 2, Chs. 27-29, 35-38, M. T. Z. Tyau, *The Legal Obligations Out of Treaty Relations between China and Other States*, Pt. II, Pt. III, Chs. 1-4.

[28] L. Oppenheim, *op. cit.*, Vol. 1, p. 273.

[29] See J. B. Moore, *A Digest of International Law*, Vol. 6, Sec. 987.

[30] The term "denial of justice" is used in two senses. In the broad sense, it means any commission or omission of an act by the Government which results in injustice; while, in the narrow sense, it is limited to judicial delinquency. Most of the authorities on international law favor the broad view. For further discussion of denial of justice, see G. G. Fitzmaurice, "The Meaning of the Term 'Denial of Justice,'" *Brit. Yr. Bk. Int. Law*, Vol. 13 (1932), pp. 93-114, C. Eagleton, "Denial of Justice in International Law," *Am. Jour. Int. Law*, Vol. 22 (1928), No. 3, pp. 538-559, J. W. Garner, "International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice," *Brit. Yr. Bk. Int. Law*, Vol. 10 (1929), pp. 181-189; O. J. Lissitzyn, "The Meaning of Denial of Justice in International Law," *Am. Jour. Int. Law*, Vol. 30 (1936), No. 4, pp. 632-646; C. Eagleton, "L'epuisement des recours internes et le déni de justice d'après certaines décisions récentes," *Rev. Droit Int. et Légis. Comp.*, Vol. 62 (1935), No. 3, pp. 504-526.

[31] The enforcement of private claims of a pecuniary nature, based upon contract or the result of civil war, insurrection, or mob violence, is condemned by the Calvo Doctrine. For a discussion of the Calvo Clause, see the United States (North American Dredging Co.) v. United Mexican States (M. O. Hudson, *Cases and Other Materials on International Law*, pp. 1240-1249).

For general principles on responsibility of States, see J. B. Moore, *A Digest of International Law*, Vol. 6, Secs. 979-1039, F. Wharton, *A Digest of the International Law of the United States*, Vol. 1, Sec. 21; C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. 1, Secs. 266-309; A. S. Hershey, *The Essentials of International Public Law and Organization*, Ch. 11; L. Oppenheim, *op. cit.*, Vol. 1, Secs. 148-167; C. G. Fenwick, *International Law*, pp. 197-210; P. Fodéré, *Traité de droit international public, européen et américan*, Vol. 1, Secs. 196-210; C. Eagleton, *The Responsibility of States in International Law* (1928); Tu Yun-tan, *State Responsibility for Injuries to Foreigners on Account of Mob Violence, Murder, and Brigandage* (1927); Wu Han-tao, *Responsibility of States for Injuries Sustained by Aliens on Account of Acts of Insurgents* (1930); E. M. Borchard, "Contractual

extraterritorial jurisdiction[32] and other restrictions imposed by foreign Powers on China's territorial sovereignty,[33] it has been put in a very difficult position with regard to exercising due diligence to protect the persons and properties of aliens. On the other hand, the Powers have usually taken advantage of this peculiar situation to exact unwarranted satisfaction in many cases and have sought more firmly to entrench the privileged position of their nationals. This anomaly was described by E. M. Borchard in the following words:

"China, indeed, regardless of treaties, has in innumerable cases been held to a degree of responsibility amounting actually to a guaranty of the security of persons and property of aliens" [34]

The cases of damages done to the persons or properties of aliens in China have largely been due to mob violence, instituted particularly against the missionaries in the latter part of the nineteenth century. The superstition of the Chinese mob, their resentment of the methods of Christian missionaries, and the abuse of privileges on the part of some of the missionaries themselves were the chief causes of this violence.[35] Cases of murder and brigandage were comparatively few. The demands of the foreign Powers were usually pressed by means of drastic diplomatic pressure[36] and sometimes by actual use of force.[37] Payment of pecuniary indemnity was almost unavoidable in any case, regardless of whether or

Claims in International Law," *Columbia Law Rev*, Vol 13 (1913), No 6, pp 457-499, C Eagleton, 'Measure of Damages in International Law," *Yale Law Jour*, Vol 39 (1929), No 1, pp 52-75, A P Fachiri, 'International Law and the Property of Aliens," *Brit Yr. Bk Int Law*, Vol 10 (1929), pp 32-55, J W Foster, "International Responsibility to Corporate Bodies for Lives Lost by Outlawry," *Am Jour Int Law*, Vol 1 (1907), No 1, pp 4-10, J. Goebel, "The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars," *ibid.*, Vol 8 (1914), No 4, pp 802-852, N D Houghton, "Responsibility for Acts and Obligations of *De Facto* Governments," *U. S Law Rev*, Vol 64 (1930), No 5, pp 242-256; M T. Manton, "Governmental Defaults in the Payment of Contractual Obligations." *ibid*, Vol 68 (1934), No 3, pp 131-142; L Preuss, "Responsibility for Hostile Propaganda against Foreign States," *Am. Jour Int Law*, Vol 28 (1934), No 4, pp 649-668, W G Rice, "State Responsibility for Failure to Vindicate the Public Peace." *ibid*, Vol 28 (1934), No 2, pp 246-254; J C. Wise, "Tort at International Law," *ibid*, Vol. 17 (1923), No 2, pp 245-251

32 See *infra*, pp. 70-74, 151-152.

33 See *supra*, pp. 19-34.

34 E. M. Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 222.

35 Such causes are no longer in existence.

36 Such as the Yangchow case in 1868, See H. B Morse, *The International Relations of the Chinese Empire*, Vol 2, pp. 226-227; the Margary Affair in 1875, see *ibid.*, Vol. 2, p. 283-305.

37 Such as the Formosan cases in 1868, see *ibid*, Vol. 2, pp. 224-226.

not the claim was based on a sound foundation.[38] Furthermore, the dismissal and punishment of local officials[39] and sometimes even of high officials,[40] the institution of measures considered adequate to prevent a recurrence of the offence,[41] and the punishment of the guilty offenders were usually required. Harshest of all were the forced cession or lease of territories and the exaction of political and economic concessions.[42] In short, in most of the cases the Chinese government was not even allowed to question the facts of responsibility or to discuss the merits of the claims of the foreign Powers.

On the other hand, in respect of the rules of responsibility of States, the Great Powers have not applied to China the same principles which they have applied among themselves. This fact is clearly pointed out by A. S. Hershey. After enumerating the general principles of the responsibility of States, he concludes:

> "These principles have been repeatedly enunciated by our leading statesmen, as also by those of Europe, and they have the almost unanimous sanction of leading authorities on International Law. Almost invariably they have been applied by European States in their relations with each other, though frequently ignored in their dealings with weaker States, more particularly in the cases of China, Turkey, and the Republics of Latin America." [43]

Professor Hershey's statement was supported by Dr. Tu Yun-tan, who, in his study on the responsibility of States for injuries done to aliens on account of mob violence, murder, and brigandage, gives the following remarks:

[38] Such as the Canton Riot in 1883, see *U. S. For. Rel.*, 1883, p. 209; 1884, pp. 46-103; the Margary Affair in 1875; the Shanghai Riot in 1905, see *ibid.*, 1906, Pt. I, pp. 369-407; 1908, pp. 146-151.

[39] Such as the Yangchow case in 1868; the Tientsin Riot in 1870, see H. B Morse, *op. cit.*, Vol. 2, pp. 239-261; the Kiangyin case in 1896, see *U. S. For. Rel.*, 1896, pp. 70-83; 1897, p. 102; the Boxer Uprising in 1900, see H. B. Morse, *op. cit.*, Vol. 3, Chs. 7-14; the Nanchang Riot in 1906, see *U. S. For. Rel.*, 1906, pp. 324-341; the Cheng-chia-tu Riot in 1915, see M. T. Z. Tyau, *The Legal Obligations Arising Out of Treaty Relations between China and Other States*, Appendix G, pp. 268-280.

[40] Such as the Chengtu Riot in 1895, see *U. S. For. Rel.*, 1895, Pt. I, pp. 88-162; 1896, pp. 46-65; the Boxer Uprising in 1900, see *ibid.*, 1900, pp. 77-382; 1901, Appendix, pp. 3-382; the Brooks case in 1899, see *Br. and For. State Papers*, Vol. 94 (1900-1901), pp. 1053-1061.

[41] Such as the Boxer Uprising in 1900, see MacMurray, Vol. 1, No. 1901/3, Art. X; the Lienchow Riot in 1905, see *U. S. For. Rel.*, 1906, Pt. I, pp. 322-323.

[42] Such as the Chapdelaine case in 1856, see H. B. Morse, *op. cit.*, Vol. 1, pp. 480-481; the Margary Affair in 1875; the Kiaochow case in 1897, see *ibid.*, Vol. 3, pp. 105-111; the Kwang-chow-wan case in 1899, see *ibid.*, Vol. 3, pp. 112-113.

[43] A. S. Hershey, *op. cit.*, p. 260.

". . . in cases of Chinese claims against the Great Powers, an air of injured innocence has been always preserved and sometimes a flat denial of responsibility has been made by the latter, even though there existed an abundant evidence of criminal negligence as well as denial of justice." [44]

Taking the American attitude as an example, B. H. Williams frankly observed that if the United States had been compelled to observe the same principles of liability which were required of China, many an American governor or sheriff would have gone to prison or even to the gallows, for acts of violence committed against aliens within their jurisdiction.[45]

Notwithstanding such injustices, the Chinese government has tried its best to protect the persons and properties of aliens residing in China. At the end of the nineteenth century, various Imperial Decrees were ordered to protect missionaries and missions in different parts of China.[46] The Manchu Court greatly regretted the outbreak of the Boxer Uprising in 1900, and immediately after the incident, issued the following Imperial Edicts:

(1) Edict of February 1, 1901, prohibiting forever, under pain of death, membership in any anti-foreign society.

(2) Edicts of February 13 and 21, April 29, and August 19, 1901, enumerating the punishments of the guilty persons responsible for the incident.

(3) Edict of August 19, 1901, prohibiting examinations in all cities where aliens were massacred or subjected to cruel treatment during the incident.

(4) Edict of February 1, 1901, declaring all local officials responsible for the maintenance of order in their respective districts.[47]

[44] Tu Yan-tan, *op. cit.*, p. 198. For illustration, the following cases may be noted: the Denver Riot in 1880, see *U. S. For. Rel.*, 1881-82, pp. 319-337; the Rock Springs Massacre in 1885, see *ibid.*, 1885, pp. 187-193; the Vallejo case in 1891, see *ibid.*, 1891, pp. 464-468; the Foochow incident in 1914, see Liu Yen, *The History of Foreign Imperialistic Invasions of China*, Vol. 2, Ch. 24; the Shanghai Massacre in 1925, see *ibid.*, Ch. 38, Sec. 1; the Massacres at Hankow and Canton in 1925, see the present writer's *Imperialism and China*, Pt. II, Ch. 3, Secs. 2, 4; the Korean Massacres in 1931, see *Memoranda presented to the Lytton Commission by V. K. Wellington Koo, Assessor* (hereafter cited as Koo, *Memoranda*), Vol. 1, pp. 43-44.

[45] See B. H. Williams, "The Politics of Missionary Work in China," *Curr. Hist.*, Vol. 23 (1925-26), No. 1, p. 73.

[46] See, for example, the Imperial Decrees ordering Protection to be Afforded to Foreign Missionary Establishments, on June 13, 1891 (Hertslet, Vol. 2, No. 179), and August 9, 1895 (*Ibid.*, Vol. 2, No. 181); Imperial Decree for the Prevention of Missionary Troubles, January 15, 1898 (*Ibid.*, Vol. 2, No. 185). See also the Memorial and Rescript concerning Intercourse between Local Officials and Missionaries, March 16, 1899 (*Ibid.*, Vol. 1, p. 718).

[47] See Art. X of the Final Protocol between China and the Allied Powers for the Settlement of Disturbances of 1900, signed at Peking, September 7, 1901 (MacMurray, Vol. 1, No. 1901/3).

The last Edict is especially important, because it prescribed severe measures against any future incident. The following is an excerpt from it:

"We again command all the responsible High civil and military Authorities of all the provinces to order their subordinates to protect, in the most efficacious manner, the agents and nationals of the foreign Powers who may enter within their districts. In case daring malefactors should urge to illtreat and massacre foreigners, order must be restored immediately and the guilty parties arrested and punished without delay. No delay should occur. If, owing to indifference, or rather of voluntary tolerance, great calamities take place, or if treaties should be violated and no immediate steps taken to make reparation or inflict punishment, the Governors-general, Governors, and the provincial or local Officials responsible will be removed and shall not be reappointed to other offices in other provinces, or hope to be reinstated or receive any further honours."[48]

As mentioned above, missionaries were usually the objective of most of the cases of mob violence.[49] Because of the widespread burning of missionary buildings in various provinces at the beginning of the present century, the Chinese government, on October 1, 1907, issued the following important Decree:

"An Edict for the Protection of missions in accordance with treaty provisions. It is the duty of all local officials to protect missionaries wherever found in China, in respect to their persons, lives, money and property.

"In the last two or three years there have been cases in every province of the burning of the buildings belonging to missionary societies. No locality has been able to keep away from doing injury to missionaries. We are greatly grieved at this. We are pushing inquiries as to the cause. A large part of the disagreement arising between the missionary societies and the common people is caused by the crookedness of the Yamen underlings.

"In times past treaties have been concluded in which it is clearly stipulated that missionaries shall do their duty in preaching their doctrines. Those who practice these doctrines should not be oppressively treated nor obstructed. If, however, there arises any question coming under the jurisdiction of Chinese law, the local officials must conform to said law in that which they do. The necessary distinctions are clearly shown.

"Let the Viceroys and Governors of all the Provinces have printed all the clauses of the treaties concerned with missions and circulate them among their subordinates, to the end that they may be energetically explained to the people and observed by the officials.

"The missionaries, on the other hand, must likewise observe treaty stipulations. The people, whether in or out of the mission societies are alike Our

[48] MacMurray, Vol. 1, p. 301.
[49] See *supra*, p. 63.

children and are all amenable to the country's law. So far as infraction of the laws and lawsuits are concerned all the people are on an equality. They should on no account be treated with any discrimination. Thus the laws will be respected.

"Let it be known forthwith to the common people and to the members of the societies that the relations of each to the others must, according to their duty, be just; the officials and their underlings must be upright in their jurisdiction. Let the people and the members of the societies of their own accord make an end of their mutual anger and jealousy. For there are certain rowdies who deceitfully stir up trouble with false reports. Continual guard should be taken against these occurrences and on signs of their appearance they should be prevented.

"If the local officials do not understand the treaty provisions, or if they are negligent or unjust in their administration, or if they are pusillanimous and backward in their actions, then gradually serious trouble will arise. In that case these officials will be sought out and condignly punished. This Decree is for their warning."

"Respect this." [50]

A few words should be mentioned about the attitude of the Nationalist regime toward the protection of aliens residing in China. During the period of the Northern Expedition, 1926-1928, the popular movement against imperialism came to a climax, and anti-imperialistic excitement arose rapidly. On March 16, 1928, the National Government issued the Decree of Protection for the Persons and Properties of Aliens, instructing local civil and military officials to take precautionary measures against any action injurious to aliens residing in various parts of China.[51] The National Government has also observed the principle that a State should take special care to prevent wrongful acts against officials of a foreign State temporarily within its territory and that the gravity of any failure to do so will be in proportion to the rank of the foreign officials. Thus the Criminal Code of 1935[52] provides that

[50] MacMurray, Vol. 1, p. 452. See also the Memorial of the Ministry of Foreign Affairs and the Imperial Rescript in regard to the Revision of the Procedure governing Intercourse between the Local Officials and Missionaries, March 12, 1908 (*Ibid.*, Vol. 1, No. 1908/4).

For references on Christian missions in China, see K. S. Latourette, *A History of Christian Missions in China* (1928); Wu Chao-kwang, *The International Aspect of the Missionary Movement in China* (1930); L. C. Goodrich, "American Catholic Missions in China," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 11 (1927), No. 3, pp. 414-431; No. 4, pp. 610-631; Vol. 12 (1928), No. 1, pp. 59-73; R. A. Norem, "German Catholic Missions in Shantung," *ibid.*, Vol. 19 (1935-36), No. 1, pp. 45-64; W. J. Padelford, "Alien Religious Property in China," *Am. Jour. Int. Law*, Vol. 26 (1932), No. 2, pp. 296-314.

[51] For the text, see *The Collected Laws of the Chinese Republic*, Chung Hwa Press, 1934 (hereafter cited as *C.L.C.R.*/1), Vol. 4, p. 499.

[52] For its text, see *The Collected Laws of the Chinese Republic*, Commercial Press, 1936 (hereafter cited as *C.L.C.R.*/2), Vol. 1, pp. 137-155.

any Chinese national, who has purposely done injury to the body, liberty, or reputation of the Head of a foreign State or its representatives, is subject to severe punishment.[53]

The above discussion reveals a contrasting picture of the efforts of the Chinese government to protect the persons and properties of aliens on the one hand and of the practice of the Great Powers to exact unwarranted satisfaction from China for damages done to their nationals on the other. Such a contrast has resulted in a certain degree of resentment among the Chinese people, especially in view of the fact that in the past China scarcely had an opportunity to question the facts and discuss the merits of the claims made by foreign Powers. The Chinese government has not the slightest intention of shunning its duty to afford due protection for aliens, but certainly it does not like to be held responsible for whatever incidents under whatever circumstances.

The Chinese attitude toward State responsibility for damages done to the persons or properties of aliens was fully revealed at the First Conference for the Codification of International Law, held at The Hague in 1930. Pending the discussion on this subject at the Third Committee of the Conference,[54] the Chinese delegation, on April 4, 1930, circulated to the Committee members the following proposal:

"A State is only responsible for damage caused by private persons to the person or property of foreigners if it has manifestly failed to take such preventive or punitive measures as in the circumstances might reasonably be expected of it had the persons injured been its own nationals." [55]

Throughout the discussion in the Committee, Dr. Wu Chao-chu, the Chinese delegate, insisted that aliens in a State should be entitled to only the same degree of protection as its nationals. The following is an extract from his statement made at the fifteenth meeting of the Committee, held on April 4:

"I have to propose, therefore, a single standard, a definite standard; that of the treatment accorded to a nation's own nationals. From the point of view of logic, from the point of view of justice, I do not see that any nation can complain. When a person goes to another country he goes there with full knowledge of the conditions, whether they are as good as those in his own country or whether they are worse. He knows beforehand what they

[53] See Art. 116.

[54] Committee on Responsibility of States. For documents on the discussion of this subject, see League Docs. C. 75. M. 69. 1929. V.; C. 351 (c). M. 145 (c). 1930. V.

[55] League Doc. C. 351 (c). M. 145 (c). 1930. V., p. 203.

are; he knows what they are just as well as he knows the climatic conditions there—for example, whether there is malaria or not. He knows the economic conditions there if the object of his visit is to make money; if his object is to travel for curiosity, he knows what the scenic conditions are.

"In the same sense he knows what the conditions are in regard to the preservation of peace and order in regard to the administration of justice. He goes there with his eyes open. Secondly, he goes there uninvited. I do not think any nation legally and morally invites foreigners to come to its soil; foreigners go there of their own accord. Why, therefore, should the Government of that country be saddled with a heavier responsibility than that which it has towards its own nationals?

"From a more or less casual reading of authorities on this matter I have not really seen any cogent reason advanced on behalf of the theory that foreigners should be treated on a higher plane than the nationals of the country; the only argument which I think is worthy of consideration is that advanced by a prominent jurist that the national of a country has a right of redress which is denied to a foreigner, that right of redress being revolution. But I submit that the foreigner has even a better right of redress than that of revolution—that is, the right of absence." [56]

Dr. Wu made it clear that the motive actuating the Chinese delegation to bring forward this proposal was not its own selfish interest. On the contrary, he explained:

"We are rather speaking against our interest. The majority of the delegates here are from Europe and America. The number of the Europeans and Americans in China for whom if necessary the Chinese Government will be responsible number only thousands, whereas our nationals abroad for whom if necessary we claim protection from European and American Governments, number not thousands—but millions. That is why I say that in bringing forward this motion, we are not prompted by any question of our own interest but purely and simply that of justice and logic." [57]

Although Dr. Wu's proposal was rejected in the Committee by 23 votes to 17,[58] it is significant in that a large number of States agreed with the Chinese attitude.[59]

[56] League Doc. 351 (c). M. 145 (c). 1930. V., p. 187.

[57] *Ibid.*

[58] The following seventeen voted for: Brazil, Chile, China, Colombia, Czechoslovakia, Free City of Danzig, Egypt, Mexico, Nicaragua, Persia, Poland, Portugal, Roumania, Salvador, Turkey, Uruguay, and Yugoslavia. The following twenty-three voted against: Australia, Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, India, Ireland, Italy, Japan, Netherlands, Norway, South Africa, Spain, Sweden, Switzerland, and the United States. Cuba and Latvia abstained from voting.

[59] For comment on the Hague Codification Conference with regard to this subject, see E. M. Borchard, "Responsibility of States, at the Hague Codification Conference," *Am. Jour. Int. Law*, Vol. 24 (1930), No. 3, pp. 517-540; G. H. Hackworth, "Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners," *ibid.*, Vol. 24 (1930), No. 3, pp. 500-516.

III. Extraterritorial Jurisdiction

It is the general rule of international law that an alien,[60] after his entrance into a State, is subject to its jurisdiction and responsible to it for all acts he commits on its territory.[61] That is, however, not the case of the nationals of many States which are entitled to the right of extraterritoriality in China.

The extraterritorial jurisdiction of foreign Powers in China is not based upon any principle of international law, but was merely created by special treaty provisions. The Sino-British Treaty of 1842[62] marks the beginning of this system, which was then chiefly justified on the ground of the fundamental difference between the Chinese and foreign laws and the imperfection of the Chinese judicial machinery.[63] Ninety years having passed, these reasons no longer hold good. At the same time, the disadvantages arising out of this anomalous system are several; namely:

(1) Derogation of China's sovereign rights;
(2) Multiplicity of courts in one and the same locality;
(3) Diversity and uncertainty of laws to be applied;
(4) Lack of effective control over witnesses or plaintiffs of another nationality;
(5) Difficulty of obtaining evidence where a foreigner commits a crime in the interior;
(6) Abuses by foreigners residing in China under cover of extraterritoriality by claiming immunity from local taxes and excises which the Chinese themselves are required to pay; and
(7) Conflict of consular and judicial functions.[64]

Failing at the Paris Peace Conference, the Chinese government requested the abolition of the extraterritorial system at the Washing-

[60] Unless he belongs to the class of those who enjoy the right of exterritoriality, such as the Head of a State, its diplomatic representatives, and the like.

[61] See L Oppenheim, *op cit*, Vol. 1, Sec 317.

[62] Hertslet, Vol. 1, No. 1.

[63] For the origin, development and present status of extraterritoriality in China, see also *infra*, pp 151-152

[64] These shortcomings of the extraterritorial system in China are summarized from the "Questions for Readjustment" submitted to the Paris Peace Conference and the statement made by Dr. Wang Chung-hui on November 25, 1921. For details, see *Chinese Soc. and Pol. Sci Rev.*, Vol. 5a (1920), Nos. 1-2, pp. 136-138; *Conference on the Limitation of Armaments, Washington, November 12, 1921 to February 6, 1922* (hereafter cited as *Washington Conference, 1921-22*), pp. 932-934.

ton Conference, 1921-1922. At the sixth meeting of the Committee on Pacific and Far Eastern Questions, held on November 25, 1921, Dr. Wang Chung-hui, in behalf of the Chinese delegation, made a statement in which the defects of the system, the progressive codification of Chinese laws, and the improvement of the Chinese legal system were emphasized. In conclusion, Dr. Wang proposed that the Powers represented at the Conference should, at a date to be agreed upon, designate representatives to enter into negotiations with China for the adoption of a plan for a progressive modification and ultimate abolition of the extraterritorial jurisdiction in China.[65] A resolution was finally adopted at the fourth plenary session of the Conference, held on December 10, 1921.[66] An excerpt from the resolution reads as follows:

"That the Governments of the Powers above named shall establish a Commission (to which each of such Governments shall appoint one member) to inquire into the present practice of extraterritorial jurisdiction in China, and into the laws and the judicial system and the methods of judicial administration of China, with a view to reporting to the Governments of the several Powers above named their findings of fact in regard to these matters, and their recommendations as to such means as they may find suitable to improve the existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality.

"That the Commission herein contemplated shall be constituted within three months after the adjournment of the Conference in accordance with detailed arrangements to be hereafter agreed upon by the Governments of the Powers above named, and shall be instructed to submit its report and recommendations within one year after the first meeting of the Commission.

"That each of the Powers above named shall be deemed free to accept or to reject all or any portion of the recommendations of the Commission herein contemplated, but that in no case shall any of the said Powers make its acceptance of all or any portion of such recommendations either directly or indirectly dependent on the granting by China of any special concession, favor, benefit or immunity, whether political or economic." [67]

By the terms of an additional resolution, the Powers which were not represented at the Conference but had extraterritorial rights in

[65] For details, see *Washington Conference, 1921-22*, pp. 932-936.
[66] For the text of the resolution, see *ibid.*, pp. 1642-1646.
[67] *Ibid.*, p. 1644. The Powers designated in the resolution are the United States, Belgium, Great Britain, France, Italy, Japan, the Netherlands, and Portugal.

China, were permitted to accede to the above resolution.[68] The Chinese attitude toward the resolution can be shown by still another additional resolution, which reads as follows:

"That China, having taken note of the Resolutions affecting the establishment of a Commission to investigate and report upon extraterritoriality and the administration of justice in China, expresses its satisfaction with the sympathetic disposition of the Powers herein-before named in regard to the aspiration of the Chinese Government to secure the abolition of extraterritoriality in China, and declares its intention to appoint a representative who shall have the right to sit as a member of the said Commission, it being understood that China shall be deemed free to accept or to reject any or all of the recommendations of the Commission. Furthermore, China is prepared to cooperate in the work of this Commission and to afford to it every possible facility for the successful accomplishment of its tasks." [69]

The commission provided for by the resolution affecting extraterritoriality was composed of one representative from each of the following States: the United States, Belgium, Great Britain, France, Italy, Japan, the Netherlands, Portugal, China, Denmark, Peru, Spain, and Sweden.[70] For various reasons, the commission did not function until January 12, 1926.[71] As a result of practical investigation in China and careful discussions at twenty-one sessions, the commission was able, in September, 1926, to make a unanimous report,[72] which consists of four parts, dealing, respectively, with (1) the practice of extraterritoriality, (2) the laws and judicial and penal systems of China, (3) the administration of justice in China, and (4) recommendations.

In the first three parts, the commission noted that although China had made much progress in the judicial field in recent years, there were still many subjects not covered by laws and the judicial administration was far from efficient and not completely independent from interference by military officials. The Chinese representative, Dr. Wang Chung-hui, signed the report, but attached a statement that, by signing, he was not to be regarded as approving all the statements in the first three parts. The recommendations

[68] See *Washington Conference, 1921-22,* pp. 1644-1646.

[69] *Ibid.,* p. 1646.

[70] The last four States were not represented at the Washington Conference, but had later adhered to the Washington resolution affecting extraterritoriality.

[71] See W. W. Willoughby, *Foreign Rights and Interests in China,* Vol. 2, p. 678.

[72] *Report of the Commission on Extraterritoriality in China, 1926* (*British Parliamentary Papers, China,* No. 3 (1926), Cmd. 2774).

can be summarized as of a two-fold character: first, the Chinese government should maintain judicial independence and adopt a suggested program for the improvement of the existing legal, judicial, and penal systems of China; and, second, the interested powers might consider the abolition of extraterritoriality according to such progressive scheme as might be agreed upon, and, pending its abolition, they should make some modifications in the existing system and practice of extraterritoriality according to a suggested program.

The abolition of extraterritoriality is one of the basic foreign policies of the Nationalist Party, which came to power in 1928. Since the interested Powers had not taken substantial steps to satisfy China's aspiration, the National Government determined to push for its immediate termination. On April 27, 1929, Dr. C. T. Wang, Minister of Foreign Affairs, addressed notes to the British, American, French, Dutch, Norwegian, and Brazilian envoys in China, urging the relinquishment of their extraterritorial rights.[73] In these notes, the Chinese government took the view that extraterritoriality was a legacy of the old regime which not only had ceased to be adaptable to changed conditions, but also had become fundamentally detrimental to the smooth working of the judicial and administrative machinery of China. In their replies, the Powers emphasized that China had not substantially carried out the recommendations made by the extraterritoriality commission in 1926 and that the Chinese judicial system was still not completely independent from extraneous influence.[74]

The National Government insisted, however, that conditions in China had materially changed since the report of the extraterritoriality commission made in 1926, and that China had already achieved a modern system of judicial administration.[75] Negotiations between China and the interested Powers proving unsatisfactory from the Chinese standpoint, the National Government became impatient and finally determined to take drastic action. On December 28, 1929, the following Mandate was issued:

[73] See *Chinese Soc. and Pol. Sci. Rev.*, Vol. 13 (1929), Supp., pp. 64-66; M. T. Z. Tyau, *Two Years of Nationalist China*, pp. 104-106.

[74] For the texts of the Notes sent by the Powers to the Chinese Minister of Foreign Affairs, See *Chinese Soc. and Pol. Sci. Rev.*, Vol. 13 (1929), Supp., pp. 158-171.

[75] See China's Rejoinders to the United States and France, September, 1929 (*Ibid.*, Vol. 13 (1929), Supp., pp. 171-177).

"In every full sovereign state foreigners as well as its nationals are equally amenable to its laws and to the jurisdiction of its tribunals. This is an essential attribute of state sovereignty and a well-established principle of international law. For more than 80 years China has been bound by the system of Extraterritoriality which has prevented the Chinese Government from exercising its judicial power over foreigners within its territory. It is unnecessary to state here the defects and disadvantages of such a system. As long as extraterritoriality is not abolished, so long will China be unable to exercise her full sovereignty.

"For the purpose of restoring her inherent jurisdictional sovereignty it is hereby decided and declared that on and after the First Day of the First Month of the Nineteenth Year of the Republic (January 1, 1930) all foreign nationals in the territory of China who are now enjoying extraterritorial privileges shall abide by the laws, ordinances, and regulations duly promulgated by the Central and Local Governments of China.

"The Executive *Yuan* and the Judicial *Yuan* are hereby ordered to instruct the Ministers concerned to prepare as soon as possible a plan for the execution of this Mandate and to the Legislative *Yuan* for examination and deliberation with a view to its promulgation and enforcement." [76]

Owing, however, to the Japanese military occupation of Manchuria, and natural calamities in various provinces, the National Government had to change its original plans. By a decree issued on December 29, 1931, it postponed indefinitely the date for the enforcement of the Regulations relating to the Exercise of Jurisdiction over Foreign Nationals in China, promulgated on May 4 of that year.[77] In view of the present situation in China, there is no prospect of the immediate abolition of extraterritoriality.[78]

[76] *Chinese Soc. and Pol. Sci. Rev.*, Vol. 14 (1930), Supp., p. 1.

[77] The Regulations would become effective on January 1, 1932. For the text, see *ibid.*, Vol. 15 (1931-32), No. 3, Supp., pp. 456-458; *C.L.C.R./1*, Vol. 4, pp. 499-500. For the extent of negotiations with the interested Powers for the abolition of extraterritoriality, see Dr. C. T. Wang's survey of China's foreign relations in 1930 (*China Year Book*, 1931-32, pp. 261-262).

[78] For references on extraterritoriality, see G. W. Keaton, *The Development of Extraterritoriality in China* (1928); Liu Shih Shun, *Extraterritoriality, Its Rise and Decline* (1925); T. F. Millard, *The End of Extraterritoriality in China* (1931); G. Soulié, *Exterritorialité et intérêts étrangers en Chine* (1926); Tchou Ngaosiang, *Le régime des capitulations et la réforme constitutionnelle en Chine* (1915); C. S. Lobingier, *Extraterritorial Cases* (1928); Chiang Chien-yao, *The Origin, Development, and Present Status of Extraterritoriality in China* (1937); W. W. Willoughby, *Foreign Rights and Interests in China*, Vol. 2, Chs. 22-26; J. Escarra, *La Chine et le droit international*, Ch. 2; J. B. Moore, *A Digest of International Law*, Vol. 2, Secs. 270-275; V. K. Wellington Koo, *The Status of Aliens in China*, Chs. 8-12; C. M. Bishop, "Extraterritoriality in China and Its Abolition," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 5a (1920), No. 3, pp. 173-188; Chin Wen-sze, "A Chinese View of the Foreign Consular Jurisdiction," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 1 (1916), No. 2, pp. 4-20; W. C. Dennis, "Extraterritoriality and Foreign Concessions in China," *Proc. Am. Soc. Int. Law*, 1930, pp. 194-212; C. Denby, "Extraterritoriality in China," *Am. Jour. Int. Law*, Vol. 18 (1924),

IV. Protection over Nationals Abroad

Corresponding to the duty to treat aliens on its territory with due consideration, every State has the right of protection over its nationals abroad.[79] China has deeply resented the imposition of various immigration laws enacted by foreign Governments against Chinese laborers. The Chinese sentiment is that such an action is an international injustice and a violation of international comity, although not in contravention of international law. During the latter part of the nineteenth century, China repeatedly protested, on the ground of infringement of the Sino-American Treaties of 1868 and 1880, to the United States against those various statutes which had the effect of excluding Chinese immigration.[80] The Chinese government wanted reciprocity, and once indicated that it might treat the Americans as the United States had treated the Chinese.[81] But all diplomatic efforts failed to persuade the American government to change its policy. The Chinese popular indignation against American exclusion laws culminated, in 1905, in the boycott of American goods.[82]

Notwithstanding the fact that many foreign nations have imposed restrictions upon Chinese immigration, there are still a large number

No. 4, pp. 667-675; J. Escarra, "Le probleme de l'exterritorialité en Chine," *Rev. droit int. privé*, Vol. 18 (1922-23), pp. 693-720; Vol. 19 (1924), pp. 31-47; R. Y. Lo, "Extraterritoriality in China," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 9 (1925), No. 2, pp. 230-237; N. W. Mah, "Foreign Jurisdiction in China," *Am. Jour. Int. Law*, Vol. 18 (1924), No. 4, pp. 676-695; G. Ohlinger, "Extraterritorial Jurisdiction in China," *Mich. Law Rev.*, Vol. 4 (1906), No. 5, pp. 339-348; G. Padoux, "Cessation du privilège d'exterritorialité en Chine pour les sujets ennemis," *Jour. droit int. privé*, Vol. 45 (1918), No. 4, pp. 1088-1090; H. S. Quigley, "Extraterritoriality in China," *Am. Jour. Int. Law*, Vol. 20 (1926), No. 1, pp. 46-68; S. H. Strawn, "China Today: Tariff, Extraterritoriality and Other Problems," *Am. Bar. Ass. Jour.*, Vol. 12 (1926), No. 12, pp. 827-832; G. W. Keeton, "The Growth and Scope of Extraterritoriality in China," *Law Quar. Rev.*, Vol. 43 (1927), No. 2, pp. 238-261; S. Turner, "Extraterritoriality in China," *Brit. Yr. Bk. Int. Law*, Vol. 10 (1929), pp. 56-65; M. T. Z. Tyau, "Extraterritoriality in China and the Question of Its Abolition," *ibid.*, Vol. 2 (1921-22), pp. 133-149; C. C. Wang, "China Still Waits the End of Extraterritoriality," *Foreign Affairs*, Vol. 15 (1937), No. 4, pp. 745-749; E. T. Williams, "Conceptions of Sovereignty in relation to the Practice of Extraterritoriality," *Nankai Social and Economic Quarterly*, Vol. 9 (1936), No. 1, pp. 1-26; Q. Wright, "Legal Consequences If Extraterritoriality is Abolished in China," *Am. Jour. Int. Law*, Vol. 24 (1930), No. 2, pp. 217-227.

[79] See W. E. Hall, *A Treatise on International Law*, Sec. 87. For a detailed discussion of the position of aliens after reception or concerning nationals and their properties abroad, see E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915).

[80] See *U. S. For. Rel.*, 1889, pp. 115-150; 1890, pp. 177, 206, 210-219, 228-230; 1892, pp. 106, 118, 119, 123, 126, 134-138, 145, 147-155, 158; 1893, pp. 244-249.

[81] *Ibid.*, 1892, p. 134.

[82] See *infra*, pp. 178-179.

of Chinese residing in all parts of the world.[83] As a whole, the Chinese overseas have faced many difficulties, owing either to the negligence of their home government or to the lack of due protection by the States where they reside.[84] With the inauguration of the Nationalist regime, the Chinese government began to pay more attention to the protection of its nationals abroad. In July, 1929, the Political Program of the National Government during the Period of Political Tutelage was enacted by the second plenary session of the Central Executive Committee of the Nationalist Party.[85] According to that Program, the following steps were to be taken immediately by the National Government:

(1) To investigate the living and business conditions of the Chinese overseas;

(2) To rearrange and coordinate the organs in charge of matters concerning Chinese overseas; and

(3) To improve the status of the Chinese overseas.[86]

On September 5, 1929, the Central Executive Committee of the Nationalist Party enacted the Regulations relating to the Registration of Chinese Abroad,[87] in accordance with which the movement of the Chinese overseas from one place to another should be reported to the Chinese legations or consulates for registration so that the Chinese government may have the latest records of their whereabouts.[88] Meantime, the Ministry of Interior was empowered

[83] For references on Chinese emigration, see H. F. MacNair, *The Chinese Abroad* (1926); Ch'eng T'ien-fang, *Oriental Immigration in Canada* (1931); Ta Chen, *Chinese Migrations: With Special Reference to Labor Conditions* (1923); R. D. McKenzie, *Oriental Exclusion* (1928); P. Wurtz, *La Question de l'immigration aux États-Unis* (1925); E. G. Mears, *Resident Orientals on the American Pacific Coast* (1928); Pan Nai Wei, *L'immigration Asiatique aux Etats-Unis d'Amérique* (1926); J. S. Tow, *The Real Chinese in America* (1923); M. T. Z. Tyau, *The Legal Obligations Arising Out of Treaty Relations between China and Other States*, pp. 105-123; Char Tin-yuke, "Legal Restrictions on Chinese in English-speaking Countries of the Pacific," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 16 (1932-33), No. 3, pp. 472-513; No. 4, pp. 615-651; Hsien T'ing-yu, "The Chinese in Hawaii," *ibid.*, Vol. 14 (1930), No. 1, pp. 13-40; H. F. MacNair, "Chinese Emigration," *ibid.*, Vol. 7 (1922), No. 2, pp. 55-77; H. F. MacNair, "The Chinese in the British Empire and the New World," *ibid.*, Vol. 7 (1922), No. 3, pp. 1-39; Wu Ching-ch'ao, "Chinese Immigration in the Pacific Area," *ibid.*, Vol. 12 (1928), No. 4, pp. 543-560; Vol. 13 (1929), No. 1, pp. 50-76; No. 2, pp. 161-182; J. J. L. Duyvendak, "Chinese in the Dutch East Indies," *ibid.*, Vol. 11 (1927), No. 1, pp. 1-13.

[84] See *supra*, pp. 64-65.

[85] For its text, see *C.L.C.R.*/2, Vol. 1, pp. 10-14.

[86] See Section on Foreign Affairs of the Political Program, No. 6.

[87] Enacted by the 33rd session of the Standing Committee of the Central Executive Committee of the Nationalist Party. For its text, see *C.L.C.R.*/2, Vol. 2, p. 1286.

[88] See Arts. 1, 2.

to issue nationality certificates to the Chinese overseas as evidence of their Chinese nationality.[89]

Various other measures have since been taken by the Chinese government along the following lines:

(1) Institution of governmental organs in charge of matters concerning emigration and related affairs;[90]

(2) Relief of the unemployment conditions of the Chinese overseas;[91]

(3) Encouragement of the Chinese overseas to return to China for the development of industry;[92]

(4) Promulgation of regulations relating to the emigration of laborers;[93]

(5) Direction and registration of various organizations of Chinese overseas;[94] and

(6) Encouragement and subsidization of education of Chinese overseas and registration of the schools established by them.[95]

[89] See the Regulations relating to the Nationality Certificates of the Chinese Overseas, promulgated by the Ministry of Interior, October 2, 1929 (*C.L.C.R./2*, Vol. 2, pp. 1056-1057).

[90] See, for example, the Organic Law of the Committee for the Management of the Affairs of the Chinese Overseas, promulgated by the National Government on February 5, 1929, and finally revised on August 13, 1932 (*Ibid.*, Vol. 1, p. 314); Regulations relating to the Bureaus of Emigration at Various Chinese Ports, promulgated by the Committee for the Management of the Affairs of the Chinese Overseas, September 15, 1933 (*Ibid.*, Vol. 2, 1285).

[91] See, for example, the Regulations relating to the Committee for the Relief of the Unemployment of the Chinese Overseas, promulgated by the Committee for the Management of the Affairs of the Chinese Overseas, September 16, 1933 (*Ibid.*, Vol. 2, 1312).

[92] See, for example, the Rules relating to the Encouragement of the Chinese Overseas returning to China for the Development of Industry, promulgated by the National Government, February 27, 1929 (*Ibid.*, Vol. 2, pp. 1310-1311).

[93] See, for example, the Regulations relating to the Emigration of Laborers, promulgated by the National Government, October 21, 1935 (*C.L.C.R./2*, Vol. 6, pp. 3453-3454).

[94] See, for example, the Regulations relating to the Registration of the Public Organizations of the Chinese Overseas, promulgated by the National Government, February 7, 1929 (*Ibid.*, Vol. 2, p. 1288); Regulations directing the Chinese Overseas to Institute Organizations, enacted by the 62nd Session of the Standing Committee of the Central Executive Committee of the Nationalist Party, March 16, 1933 (*Ibid.*, Vol. 2, p. 1287); Regulations relating to the Registration of Cultural Organizations of the Chinese Overseas, promulgated by the Committee for the Management of the Affairs of the Chinese Overseas, September 15, 1933 (*Ibid.*, Vol. 2, p. 1288); Regulations relating to the Registration of the Organizations of the Chinese Overseas, promulgated by the Committee for the Management of the Affairs of the Chinese Overseas on November 8, 1933, and finally revised on May 31, 1935 (*Ibid.*, Vol. 2, p. 1289).

[95] See, for example, the Organic Law of the Planning Committee for the Education of the Chinese Overseas, promulgated by the National Government, December 21, 1929 (*Ibid.*, Vol. 2, p. 1290); Temporary Regulations relating to the Committee of Education for the Chinese Overseas, promulgated by the Ministry of Education, February 25, 1931 (*Ibid.*, Vol. 2, pp. 1292-1294); Art. 54 of the Provisional Constitution of the Chinese Republic during the Period of Political Tutelage, promulgated by the National Government on June 1, 1931 (*China Year Book*, 1931-32, pp. 688-690); Regulations relating to the Registration of

However, owing to many difficult and more pressing problems which the Chinese government has had to face first, such measures have not all yet been put into practice.

V. Passports

"A passport is the accepted international evidence of nationality; in its usual form, it certifies that the person described in it is a citizen or subject of the country by whose authority it is issued, and requests for him permission to come and go, as well as lawful aid and protection."[96] The requirement of a passport for an alien to enter Chinese territory has been discussed above.[97] Chinese nationals going abroad are required to have passports as evidence of their Chinese nationality. The issuance of passports to Chinese nationals is within the competence of the Ministry of Foreign Affairs.[98]

There are three kinds of Chinese passports: (1) diplomatic, (2) official, and (3) ordinary. The following persons may apply for diplomatic passports:

(*a*) Members of the Central Executive Committee or the Central Supervisory Committee of the Nationalist Party, and also members of their families;

(*b*) Members of the State Council of the National Government, Presidents and Vice-Presidents of the Ministries, and also members of their families;

(*c*) Diplomatic or consular officers, and also members of their families;

(*d*) High officials (*jen* rank) sent by the National Government on official duty to foreign countries, and also members of their families;

(*e*) Diplomatic couriers; and

(*f*) Staffs of the above-mentioned persons.

Schools established by the Chinese Overseas, promulgated by the Ministry of Education on September 12, 1929, and finally revised on February 20, 1934 (*C.L.C.R.*/2, Vol. 2, pp. 1300-1301). For Chinese nationals studying abroad, see Art. 8, No. 4 of the Organic Law of the Ministry of Foreign Affairs, promulgated by the National Government on December 8, 1928, and revised on February 21, 1931 (*Ibid.*, Vol. 1, pp. 326-327); Regulations relating to the Studying Abroad, promulgated by the Ministry of Education in April, 1933, and revised on June 30, 1933 (*Ibid.*, Vol. 7, pp. 4217-4220).

96 J. B. Moore, *A Digest of International Law*, Vol. 3, p. 856.

97 See *supra*, pp. 59-61.

98 See Art. 1 of the Rules governing the Issuance of Passports, promulgated by the National Government, January 31, 1931 (*C.L.C.R.*/1, Vol. 4, pp. 504-506).

Persons other than those listed above sent by the National Government or local governments to foreign countries on official duty may apply for official passports. Others may only apply for ordinary passports.[99] The period of validity of the diplomatic and official passports is one year, while that of the ordinary passports is three years and may be extended upon permission of Chinese diplomatic or consular officers abroad.[100]

VI. Extradition

Extradition is the delivery by one State of a person who has committed or has been convicted of a crime or crimes within the jurisdiction of another State upon the requisition of the latter. So far, there is no general rule of international law regulating extradition. Numerous treaties have, however, been concluded among States providing for the extradition of criminals since the last century.[101]

The mutual surrender of fugitives was practiced between China and Russia even as early as in the seventeenth century. In the Treaty of Peace, Boundary, etc., between China and Russia, signed at Niptchoa in 1689,[102] extradition of fugitives was provided for in the following clause:

"From the day on which this eternal peace between the two Empires shall have been sworn to, no fugitive or deserter shall be received, on one part or the other. But if any subject of either of the two Empires should flee into the territory of the other, he shall be immediately captured and sent back." [103]

On October 21, 1727, another Treaty of Peace, Boundaries, etc., between China and Russia was concluded.[104] In connection with the delimitation of the boundaries between the two countries, extradition of fugitives was agreed upon:

"This present Treaty of peace, renewed and concluded between the two Empires, requires that it shall no longer be a question of what has happened previously between the two countries.

"The return of previous fugitives shall not be asked for, and they shall remain in the Empire where they are; but those who cross the frontier hence-

[99] See Arts. 2-5 of the Rules governing the Issuance of Passports, January 31, 1931.
[100] See *ibid.*, Art. 11.
[101] For a list of such treaties, see *Harvard Research in International Law*, I. Extradition, Appendices I, II, III, V.
[102] Hertslet, Vol. 1, No. 76 (from *Archives Diplomatiques*, 1861, Tome 1).
[103] Art. IV. Quotation translated from the French.
[104] Hertslet, Vol. 1, No. 77 (from *Archives Diplomatiques*, 1861, Tome 1).

forth, cannot, under any pretext, be permitted to remain. They must, on the contrary, be sought for without delay, in order that they may be taken and returned to the authorities of the respective frontiers." [105]

Similar provisions are found in many later treaties concluded between China and other nations.[106]

In some treaties, the extradition of fugitives was only limited to those who took refuge in the houses or vessels of Chinese or foreign nationals in China. The Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, signed at Canton, March 20, 1847,[107] provides:

"The local authorities of the Chinese Government will cause to be apprehended all mutineers or deserters from on board Swedish and Norwegian vessels in China, and will deliver them up to the Consuls or other officers for punishment. And if criminals, subjects of China, take refuge in the houses or on board the vessels belong to subjects of His Majesty the King of Sweden and Norway, they shall not be harboured or concealed, but shall be delivered up to justice, on due requisition by the Chinese local officers addressed to those of the United Kingdoms of Sweden and Norway." [108]

A better example is the Treaty of Amity, Commerce, and Navigation between China and Spain, October 10, 1864. Article XVIII of the Treaty reads:

"Any Chinese subject who may have committed a crime, and who may in any Chinese port have sought asylum in the house of a Spanish subject, or on board a Spanish vessel, shall, so far from being received and concealed, be handed over to the Chinese authorities, upon the latter claiming him from the Spanish Consul who may be established at the port.

"In the same way, if any Spanish sailor or sailors should desert from his or other vessel, and take refuge in any Chinese house, or on board any Chinese ship, the local authority, upon receiving the application of Her Catholic Majesty's Agent, shall, without loss of time, take the necessary steps for discovering the fugitive, and, when arrested, shall deliver him over to the aforesaid Agent of the Spanish Government."

[105] Art. II. Quotation translated from the French.

[106] See, for example, Art. X of the Treaty of Commerce between Russia and China, concerning Trade between Ili and Tarbagatai, signed at Kouldja, July 25, 1851 (Hertslet, Vol. 1, No. 79); Art. VIII of the Additional Treaty of Commerce, etc., between Russia and China, signed at Peking, November 2/14, 1860 (*Ibid.*, Vol. 1, No. 82); Art. XV of the Convention between Great Britain and China, giving effect to Article 3 of the Convention of July 24, 1886, relative to Burmah and Tibet, March 1, 1894; Art. V, Par. 3 of the Treaty of Amity and Commerce between Corea and China, signed at Seoul, September 11, 1899 (*Ibid.*, Vol. 1, No. 37).

[107] Hertslet, Vol. 1, No. 93.

[108] Art. XXIX, Par. 1.

Similar provisions were included in many other treaties between China and other nations.[109]

In still other treaties, the extradition of fugitives is limited to those who take refuge in certain regions of the contracting parties. In the Sino-British Treaty of 1858, only Hongkong was designated.[110] Annam was specified in the Sino-French Convention of 1886,[111] and the Agreement between France and China for the Maintenance of Order on the Sino-Annamite Frontier, signed at Peking, April 13, 1915.[112] When Kuang-chou-wan and Kowloon were leased to France and Great Britain respectively,[113] the extradition of fugitives who took refuge in such regions was agreed upon in accordance with the existing Sino-French and Sino-British treaties.[114] The extradition of fugitives, provided in Article IX of the Sino-French Convention of May 16, 1930, is limited to those who take refuge in Annam and the adjacent Chinese provinces.

In the case of Chung Chi Cheung v. The King, decided by the Judicial Committee of the British Privy Council on December 2, 1938,[115] the Chinese government has yielded to the principle that a national of a foreign State committing crimes on board of a Chinese public ship within the territorial waters of that State and ultimately arrested by its local authorities is not extraditable. China has also adhered to the general rule that political criminals are not to be extradited. The fact that the Sino-British Treaty of 1858 does not include the extradition of political criminals can be evidenced by the Ordinance of the Government of Hongkong of July 3, 1889.[116] This Ordinance, enacted for the enforcement of the provisions on extradition of the said Treaty, provides:

[109] See, for example, Art. XXI, Par. 2 of the Treaty of Peace, Friendship, and Commerce between Great Britain and China, June 26, 1858; Art. XXXII of the Treaty of Friendship, Commerce, and Navigation between China and France, June 27, 1858; Art. XVII, Par. 1 of the Commercial Convention between France and China, signed at Tientsin, April 25, 1886 (Hertslet, Vol. 1, No. 47); Art. XXIV of the Treaty of Commerce and Navigation between China and Japan, July 21, 1896; Art. XI of the Treaty of Friendship, Commerce, and Navigation between China and Sweden, July 2, 1908.

[110] See Art. XXI, Par. 1.

[111] See Art. XVII, Par. 2.

[112] See Art. IV. For the text of the Agreement, see MacMurray, Vol. 2, No. 1915/4.

[113] See *supra*, p. 20.

[114] See Art. VI of the Convention between France and China for the lease of Kuang-chou-wan, signed at Peking, May 27, 1898 (MacMurray, Vol. 1, No. 1898/10); Article on extradition of the Convention between Great Britain and China respecting an Extension of the Hongkong Territory, signed at Peking, June 9, 1898 (*Ibid.*, Vol. 1, No. 1898/11).

[115] Reprinted in *Am. Jour. Int. Law*, Vol. 33 (1939), No. 2, pp. 376-384.

[116] Hertslet, Vol. 2, No. 178.

"A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the Magistrate, or of a Judge of the Supreme Court, if brought before the Court on a writ of *habeas corpus,* or of the Governor, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character, or for an offence which is not an extradition crime." [117]

In the Sino-French Convention of May 16, 1930, no mention was made about the non-extradition of political criminals. But Article IX of the Convention lays down the restriction that "an exception shall be made in all cases which, in accordance with international usage, do not give rise to extradition." The extradition of political criminals is, therefore, not required by the Convention, because international usage is now against this practice.

The Chinese attitude toward the non-extradition of political criminals can be further illustrated by the case of Horace G. McKinley in 1907. Mr. McKinley, a defaulting American financial agent, fled to China from the United States. Upon the request of the American government to seize and extradite him, the Chinese government replied that "all American criminals guilty of an ordinary offence who have taken refuge in Chinese territory can, of course, be extradited, except those guilty of a political offence."[118] As Mr. McKinley was not a political criminal, he was seized and extradited by the Chinese government to the United States.[119]

The principal difficulty is, of course, how to determine whether a crime is political or not. The opinions of legal authorities are at variance. No provision defining a political crime can be found in the treaties between China and other nations. Perhaps careful consideration of the circumstances of a crime is the only way of determining its character. For example, the Sino-French Agreement of April 13, 1915, provides:

"In the event that the accused should invoke the exception of political crime or crime incidental to a political crime, the circumstances of the crime or offence should form the subject of a special attentive and minute examination, in order that the guilty party may not escape from justice by alleging a false pretext." [120]

[117] Hertslet, Vol. 2, p. 1131.

[118] See the Note sent by Prince Ch'ing to Mr. Rockhill, American Minister at Peking, March 19, 1907, concerning the Extradition of Horace G. McKinley (*U.S. For. Rel.,* 1908, p. 130).

[119] For details of the case, see *ibid.,* 1908, pp. 129-134.

[120] Art. IV, Par. 4.

Pirates are enemies of all mankind, and by their illegal acts, lose *ipso facto* the national character and protection of their native country. They can be arrested, tried, and punished by the competent authorities of any State.[121] Thus in the case of The Attorney-general for Hongkong v. Kwog-A-Sing in 1873, the extradition to China of a Chinese national committing piracy was denied by the Judicial Committee of the Privy Council.[122] However, in the Sino-French Agreement of April 13, 1915, piracy was provided as one of the extraditable crimes. Article IV of the Agreement reads in part:

"Any individual guilty in China of an act of pillage or piracy or of any crime or common law offence, shall, in a proper case, in conformity with Article 17 of the convention of April 25, 1886, and after the execution of the procedure for extradition, be extradited and turned over to the said Chinese authorities; the latter will transmit to the Governor General with their request for extradition the necessary dossier.

"Any individual guilty in Indo-China of an act of pillage or piracy or of any crime or common law offence, shall, in a proper case, in conformity with Article 17 of the convention of April 25, 1886, and after the execution of the procedure for extradition, be extradited and turned over to the French authorities. The latter will transmit to the Chinese Government with their request for extradition the necessary dossier." [123]

It should be noted that the extradition of fugitives must be reciprocal. It has been so provided in the treaties concluded between China and other nations. In the Sino-Russian Treaty of July 25, 1851, particular emphasis was made in that "there shall be reciprocal extradition of fugitives of this type."[124] The case of Horace G. McKinley is exceptional. The extradition of Mr. McKinley by the Chinese government to the United States was not based upon the principle of reciprocity but was an act of international comity, because the American government notified the Chinese government that although his extradition might be granted, the American government was prevented by its laws from being able to reciprocate the favor should the occasion arise.[125]

[121] See *supra*, pp. 50, 52-54.

[122] See M. T. Z. Tyau, *The Legal Obligations Arising Out of Treaty Relations between China and Other States*, pp. 191-192.

[123] Pars. 1, 3.

[124] Art. 10.

[125] See the Note sent by Mr. Rockhill, American Minister at Peking, to Prince Ch'ing, March 12, 1907 (*U.S. For. Rel.*, 1908, pp. 129-130).

With regard to the procedure of extradition, an official document of requisition from the demanding Government is generally required. The Sino-British Convention of March 1, 1894, provides:

"Should criminals, subjects of either country, take refuge in the territory of the other, they shall, on due requisition being made, be searched for, and, on reasonable presumption of their guilt being established, they shall be surrendered to the authorities demanding their extradition.

" 'Due requisition' shall be held to mean the demand of any functionary of either Government possessing a seal of office, and the demand may be addressed to the nearest frontier officer of the country in which the fugitive has taken refuge." [126]

Similar provisions were embodied in other treaties concluded between China and other nations.[127] Some States have enacted special municipal laws which enumerate the extraditable crimes and regulate the procedure of extradition.[128] There cannot be found any Chinese statute of this nature. In China, the law merely provides that the matter of extradition is within the discretion of the Division of Criminal Affairs of the Ministry of Justice.[129]

[126] Art. XV.

[127] See, for example, Art. V of the Treaty of Amity and Commerce between Corea and China, September 11, 1899; Art. IV of the Sino-French Agreement of April 13, 1915.

[128] For the text of the extradition statutes of different States, see *Harvard Research in International Law*, I. Extradition, Appendix VI.

[129] See Art. 8, No. 3 of the Organic Law of the Ministry of Justice, promulgated by the National Government on April 17, 1929 (*C.L.C.R./2*, Vol. 1, p. 345); Art. 9, No. 4 of the Administrative Rules of the Ministry of Justice, promulgated by the Judicial *Yuan* on March 2, 1935 (*Ibid.*, Vol. 1, pp. 487-490).

CHAPTER IV

NATIONALITY

I. Enactment of Nationality Laws

Nationality[1] is the status of a person[2] who is a member of a State, entitled to its protection and bound to the State by the tie of allegiance. It is generally recognized that individuals are not subjects of international law, so the function of nationality is to link the former with the benefits of the latter. Although nationality is a matter of great concern in modern international relations, each State has the right to prescribe under its own law who are its nationals.

It was not until 1909 that a nationality law was promulgated by the Chinese government.[3] Up to that time, the rule governing nationality was one of customary law: the child of a Chinese subject acquired his nationality.[4] At the beginning of the twentieth century, some States, especially the Netherlands, took steps toward changing the status of the Chinese in their colonies. Due to the conflicting practices of *jus sanguinis* in China and *jus soli* in the Netherlands, serious controversy arose between the two countries.

[1] The term "nationality" may be used in two senses: political and ethnographical. It is only the political aspect of nationality which is of international interest.

[2] The nationality of things, such as corporations and ships, is chiefly a matter of private international law, so it will not be discussed here.

[3] The fact that China had no written nationality law before 1909 can be shown by the following extract from the Communication of Ministers of the Wai Wu Pu (Ministry of Foreign Affairs) to Mr. Coolidge, American Chargé d'Affaires at Peking, November 15, 1906:

"The Board at once communicated with Commissioners on Revision of the Code, asking them to investigate and report. We are now in receipt of their reply, saying that the Code of China as yet contains no provisions touching the question of citizenship, but that they were now engaged in an examination of the codes of various countries with a view to the revision of the laws of China, and that after the revision should be completed and promulgated they would inform us so that we might be enabled to communicate to your Excellency the facts desired." (*Report on the Subject of Citizenship, Expatriation and Protection Abroad,* December 20, 1906, House of Representatives, 59th Cong., 2d. Sess., Doc. No. 326, p. 291).

[4] See C. Sainson and G. Cluzel, "La nationalité dans le nouveau droit chinois," *Jour. Droit Int. Privé,* Vol. 37 (1910), p. 411.

"The government of the Netherlands claimed that by the *jus soli* Chinese born in Dutch possessions were Dutch subjects, whether in the Indies or in China. Furthermore it claimed that China had no code of nationality on which to found a claim to the allegiance of Chinese abroad. China in turn refused to acknowledge the application of the *jus soli* and claimed that by the *jus sanguinis* Chinese wherever born and wherever resident were Chinese subjects." [5]

Professor H. F. MacNair, authority on Far Eastern relations, observes that in order to make good its claims and to refute the Dutch argument concerning China's lack of nationality law, the Imperial government promulgated a nationality law on March 28, 1909, by which the nationality of foreign born Chinese was to be determined.[6] That this was one of the motives prompting the enactment of the nationality law in 1909 is confirmed in the memorial submitted by the Ministry of Foreign Affairs to the Throne, which states that the purpose of the law was:

"(1) to set up high qualifications for naturalization so that only desirable aliens should be admitted to Chinese nationality, and (2) to keep natural-born Chinese from falling under foreign dominion." [7]

After the establishment of the Chinese Republic, the nationality law of 1909 was re-enacted and the new law was promulgated on November 18, 1912.[8] The law of 1912 was later replaced by that of December 30, 1914,[9] which was superseded by that promulgated on February 5, 1929.[10]

II. Modes of Acquiring Chinese Nationality

In all there are seven modes, by which Chinese nationality can be acquired. They are: birth, naturalization, marriage, legitimation, adoption, redintegration, and revocation of voluntary expatriation certificate.

[5] H F MacNair, "Chinese Acquisition of Foreign Nationality," *Chinese Soc and Pol Sci. Rev*, Vol. 7 (1922), No 4, pp 5-6

[6] See *ibid*, p. 6. The text of the Nationality Law, March 28, 1909, can be found in *Am Jour Int. Law*, Vol. 4, (1910), Supp, pp. 160-166.

[7] Tsai Chutung, "The Chinese Nationality Law," *Am Jour Int. Law*, Vol. 4 (1910), No. 2, p. 407.

[8] Its text can be found in *Rev. Droit Int. Privé*, Vol. 10 (1914), pp. 244-247.

[9] Its text can be found in *Br. and For. St. Papers*, Vol. 114 (1921), pp. 667-671; *British Parliamentary Papers*, Miscellaneous No. 7 (1922), Cmd. 1771, pp. 10-13.

[10] Its text can be found in *The Collected Laws of the Chinese Republic*, Chung Hwa Press, 1934 (hereafter cited as *C.L.C.R./1*), Vol. 3, pp. 66-69; *The Collected Laws of the Chinese Republic*, Commercial Press, 1936 (hereafter cited as *C.L.C.R./2*), Vol. 2, pp. 1049-1050, R. W Flournoy and M. O Hudson, *A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes, and Treaties*, pp. 175-178.

Birth

In China, as in other countries, acquisition of nationality by birth is the most important. In the world today there are two principal rules determining the nationality of a person by birth. They are, (1) that of *jus sanguinis,* which is the principle that nationality is determined by descent or parentage, and (2) that of *jus soli,* which is the rule that nationality is determined by the place or locality of birth. With respect to their use of one or the other of these rules nations can be roughly divided into three groups: (1) those relying solely on *jus sanguinis,* (2) those relying principally on *jus sanguinis* and partly on *jus soli,* and (3) those relying principally on *jus soli* and partly on *jus sanguinis.*[11] China is among the first group, adopting *jus sanguinis* as the sole basis to determine Chinese nationality by birth. Hence, according to the Chinese nationality law, the following persons shall have Chinese nationality wherever they are born:

"(1) One born of a father who at the time of his (or her) birth is Chinese;
"(2) One born after the death of the father, if the father at the time of death was Chinese;
"(3) One born of a Chinese mother, the father being unknown or without a determinate nationality." [12]

Foundlings and children born of stateless persons in China automatically acquire Chinese nationality. This is the only exception to the rule of *jus sanguinis* which China makes. The nationality law of 1929 provides in this respect that Chinese nationality shall belong to:

"One who is born in China and whose parents are unknown or have no nationality."[13]

Naturalization

Qualifications of Naturalization. Besides birth, naturalization is the most important mode of acquiring nationality. Naturalization in its broad sense may include acquisition of nationality as a result of marriage, legitimation, adoption, option, acquisition of domicile, appointment as a governmental official, and grant on applications. Here, however, the term naturalization is used in its narrow sense,

[11] For the nationality laws of various countries, see R. W. Flournoy and M. O. Hudson, *op. cit.,* Pt. I.
[12] Nationality Law of 1929, Art. 1, Nos. 1-3.
[13] *Ibid.,* No. 4.

being limited to the acquisition of nationality by governmental grant on application. It is within the competence of any State to receive an alien as a national of the State through a formal act on application of the favored alien.

The Chinese government has never discriminated against any particular race in determining who may acquire Chinese nationality by naturalization. According to the Chinese nationality law, any alien or stateless person can become naturalized by permission of the Ministry of the Interior, if he (or she) has fulfilled the following conditions:[14]

"(1) Having his (or her) domicile in China for more than five years without interruption;[15]

"(2) Aged above twenty and having legal capacity as defined by the Chinese law and the law of his (or her) native country;[16]

"(3) Good moral character;

"(4) Having enough property and skill and ability to support himself (or herself)."[17]

These four conditions have to be met by any alien seeking to become a naturalized Chinese with the following exceptions:

(1) Any of the following aliens, who has his (or her) domicile in China, may be naturalized even if not complying with the requirement of a residence of more than five years without interruption:[18] (*a*) one whose father or mother was a Chinese national and who has had residence in China for more than three years; (*b*) one who has married a Chinese woman and had residence in China for more than three years;[19] (*c*) one who was born in China and has had residence in China for more than three years; (*d*) one who was born in China and whose father or mother was also born in China; and (*e*) one who has had his (or her) residence in China for more than ten years without interruption.

[14] Nationality Law of 1929, Art. 3.

[15] The nationality law of 1929 is more liberal in this point than that of 1909, which required ten years of domicile in China without interruption.

[16] For those who have no nationality at the time of their naturalization, this requirement can be fulfilled only according to the Chinese law.

[17] In addition to the above four conditions, the former nationality laws of 1909, 1912, and 1914 further required that he (or she) should by the law of the country of which he (or she) was a national be deemed to have lost the nationality thereof in consequence of his (or her) being naturalized abroad.

[18] Nationality Law of 1929, Art. 4.

[19] By implication, this exception is not applied to a woman who has married a Chinese national and had residence in China for more than three years.

(2) An alien who has rendered exceptional service to China is not required to fulfill the four conditions stated above.[20]

(3) An alien who has his (or her) domicile in China and whose father or mother is a Chinese national is not required to fulfill conditions (1), (2), and (4).[21]

With regard to the status of a naturalized national's wife and his children, Article 8 of the Nationality Law of 1929 reads:

"A naturalized national's wife and his children who have not attained majority according to the law of his native country, shall, because of his naturalization, acquire the nationality of the Chinese Republic except where the law of the native country of his wife and children is in conflict with this provision."

Where the law of their native country is in conflict with the above provision, it is not clear whether or not the wife or minor children of a naturalized national may apply separately for naturalization. The Nationality Law of 1909 threw more light on this question. According to that law, separate naturalization of the naturalized national's wife or children was permitted even though they did not comply with the four basic conditions prescribed for naturalization.[22] Question has also arisen as to whether or not a married woman can apply independently for naturalization during the lifetime of her husband. There cannot be found any specific provision to this effect in the Nationality Law of 1929. According to the nationality laws promulgated in 1909,[23] 1912[24] and 1914,[25] it was not permitted unless her husband was naturalized at the same time. It is also doubtful whether or not the children of a naturalized widow who are below the majority age according to the Chinese law and the law of her native country do, as a result of her naturalization, acquire Chinese nationality.[26]

Status of Naturalized Persons. Whereas naturalization makes an alien a national, it does not necessarily give the naturalized person

[20] Nationality Law of 1929, Art. 6. In permitting such an alien to be naturalized, the Ministry of the Interior must first secure authorization from the National Government.

[21] Nationality Law of 1929, Art. 5. Besides the exceptions under the three main headings, the Nationality Law of 1909 further provided that a major child of a naturalized person, when residing in China, may also apply for naturalization without being required to fulfill the four conditions stated above.

[22] Art. 6, Par. 2.

[23] Art. 7.

[24] Art. 5.

[25] Art. 5.

[26] There is no provision in this respect in any of the Chinese nationality laws.

the same political rights possessed by native born citizens. The practice of countries is by no means uniform in this respect.[27] The Chinese nationality law is rather strict on this point. Article 9 of the Nationality Law of 1929 reads in part:

"A person who acquires the nationality of the Chinese Republic under Article 2 and the wife and children of a naturalized national who acquire the nationality of the Chinese Republic because of his naturalization cannot hold the following public offices: [28]

"(1) Member of the State Council, President of a *Yuan,* Head of a Ministry or Chief of a Department;
"(2) Member of the Legislative *Yuan* or Member of the Supervisory *Yuan;*
"(3) Ambassador and minister plenipotentiary;
"(4) Officer of the sea, land, or air forces;
"(5) Member of a provincial or territorial government;
"(6) Mayor of a special municipality;
"(7) Member of a provincial assembly of any class."[29]

However, such disqualifications can be removed under certain conditions. In the same article, the Law provides:

"For a naturalized national who has acquired nationality according to the provision of Article 6, the Ministry of the Interior may ask the National Government to remove the foregoing disqualifications, provided that he (or she) has been naturalized after five full years from the date of naturalization. For others who have acquired their nationality otherwise, the Ministry of the Interior may do so, provided they have been naturalized after ten full years from the date of naturalization." [30]

[27] For instance, a naturalized citizen of the United States can never be elected President or Vice-President according to Article 2 of its Constitution; on the other hand, according to Section 3 of the British Nationality and Status of Aliens Act, 1914, a naturalized British subject is entitled (subject to the provisions of this Act) to the same rights as a natural-born subject.

[28] Persons under the provision of Article 2 are to be discussed separately. The Nationality Law of 1909 applied the restrictions to naturalized nationals in general; that of 1912, only to naturalized nationals and their children; and that of 1914, only to naturalized nationals and their wives.

[29] The list of offices as enumerated here would be, of course, subject to revision if the organization of the Chinese government were changed. Thus, according to the Nationality Law of 1909, a naturalized national was incapable of becoming: (1) an office holder in the Grand Council or in the Privy Council, (2) a provincial officer above the fourth rank, (3) an officer or soldier in the army, or (4) a member of either House of Parliament or of a provincial council. The Nationality Law of 1912 and also that of 1914 designated the following offices which a naturalized national was disqualified to hold: (1) President or Vice-President, (2) Secretary of State or Head of Ministry, (3) member of the legislative or local self-governing body, (4) head of the Supreme Court, (5) head of the Audit Bureau, (6) Ambassador or Minister abroad, (7) officer in army or navy, and (8) civil governor of a province.

[30] A naturalized national who has acquired nationality according to Article 6 is one who has rendered exceptional service to China. See *supra,* p. 89, No. (2). For others, see *supra,* pp. 87-89.

In this respect, the Nationality Law of 1929 is more liberal than the laws promulgated in 1909[31] and 1912,[32] in accordance with which ten years were required for the naturalized persons under the first condition and twenty years under the second.

On February 24, 1930, the Ministry of the Interior promulgated Regulations governing the Removal of Disqualifications Applied to Naturalized Persons.[33] According to the Regulations, a naturalized petitioner must fulfill the following requirements in order to remove the disqualifications designated above:

"(1) Having his (or her) domicile in China after naturalization and is still residing in China;

"(2) Aged above twenty and having legal capacity according to the Chinese law; [34]

"(3) Good moral character;

"(4) Ability to speak and write Chinese;

"(5) No evidence of disloyalty to the Nationalist Government of China;

"(6) Having enough property and skill and ability to support himself (or herself)." [35]

If the Ministry of the Interior is satisfied with the petition,[36] it makes a recommendation to the Executive *Yuan* which has final authority to remove the political disqualifications of naturalized nationals.

Mere Residence and Travel not Counted as Naturalization. Due to modern facilities of communication and transportation, intercourse between different countries becomes more intimate. Frequently, by treaty provisions, nationals of one country visiting or residing in another can enjoy the same privileges, immunities, or exemptions in respect to travel and residence as nationals of the most favored nation. This is, however, not a process of naturalization, as explained in the Treaty of Commerce between China and the United States, November 8, 1858.[37] Article 6 of the Treaty reads:

"Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel as may there be enjoyed by the citizens or subjects of the most favored nation; and,

[31] Art. 8.
[32] Art. 11.
[33] For the text, see *C.L.C.R./2*, Vol. 2, p. 1055.
[34] See Arts. 13-15, Civil Code (*C.L.C.R./2*, Vol. 1, pp. 37-89).
[35] Art. 2 of the Regulations.
[36] For the form of petition, see *C.L.C.R./2*, Vol. 2, p. 1055.
[37] Hertslet, Vol. 1, No. 95.

reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing therein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."

Marriage

Marriage is another mode of acquiring Chinese nationality. The Nationality Law of 1929 provides that an alien who is the wife of a Chinese national acquires Chinese nationality except in cases where under the law of her native country she retains her nationality.[38] The purpose of this provision is two-fold: to give women freedom in choosing nationality, and also to avoid cases of double nationality through marriage.[39] Whereas an alien woman who becomes the wife of a Chinese national can acquire Chinese nationality under the above provision, she is subject to the same disqualifications as are imposed upon naturalized nationals and such disqualifications can only be removed in the same way as prescribed in the case of naturalized nationals.[40]

It is well to note that the acquisition of Chinese nationality through marriage is limited to women, because the Nationality Law of 1929 does not provide that an alien who becomes the husband of a Chinese national can acquire Chinese nationality as a result of the marriage.

Legitimation

An alien can acquire Chinese nationality through legitimation. The Nationality Law of 1929 provides that the following persons are qualified to do so:

"One whose father is a Chinese national and who is recognized by him as his child;[41]

[38] Art. 2, No. 1.

[39] In order to prevent or mitigate possible international controversies arising out of Nationality complications, the Ministry of the Interior issued a circular instruction in September, 1931, advising the provincial governments to pay special attention to the transfer of nationality of foreign women who are married to Chinese nationals. The following is an extract from the said circular instruction:

"Hereafter the provincial governments and the Chinese legations and consulates abroad should pay special attention to examining on application whether or not a foreign woman who is married to a Chinese national retains the nationality of her original country according to the law thereof." (*C.L.C.R.*/1, Vol. 3, p. 89.)

[40] *Supra*, pp. 89-91.

[41] Art. 2, No. 2.

"One whose father is unknown, or whose father has not recognized him (or her) as his child; but whose mother is a Chinese national and has recognized him (or her) as such." [42]

The status of a person who acquires Chinese nationality through legitimation is the same as that of a naturalized national.[43]

Adoption

Adoption as a mode of acquiring Chinese nationality is also recognized. The Nationality Law of 1929 provides that Chinese nationality is obtained by a person who is:

"An adopted child of a Chinese national."[44]

A person who acquires Chinese nationality through adoption is subject to the same disqualifications and entitled to the same rights as a naturalized national.[45]

Redintegration

Persons, who have been natural-born nationals of China but have lost their original nationality through naturalization abroad or for some other cause, can regain their original Chinese nationality on fulfilling certain conditions. This process, by which the favored person is redintegrated or resumed into his (or her) original nationality, is called redintegration or resumption.[46]

The Nationality Law of 1929 makes the following provisions concerning acquisition of Chinese nationality by redintegration:

(1) One, who is the wife of an alien and has obtained permission from the Ministry of the Interior to renounce her nationality, can, after the termination of such marriage relationship, regain it by authorization of the Ministry of the Interior on application.[47]

(2) One, who has been permitted by the Ministry of the Interior to renounce his (or her) Chinese nationality and has acquired the nationality of a foreign country, can regain Chinese nationality by permission of the Ministry of the Interior on application provided

[42] Art. 2, No. 3.
[43] *Supra*, pp. 89-91.
[44] Art. 2, No. 4.
[45] *Supra*, pp. 89-91.
[46] See L. Oppenheim, *International Law*, Vol. 1, p. 521.
[47] See Arts. 10, 15.

that he (or she) has residence in China, good moral character, and enough property, skill, and ability to support himself (or herself).[48]

It should be emphasized that a naturalized national, who later renounces his Chinese nationality, or his wife and children who have acquired Chinese nationality because of his naturalization and who have lost it afterwards, can not regain Chinese nationality through redintegration.[49] Furthermore, if a person resumes his (or her) Chinese nationality by redintegration, he (or she) is subject to the same disqualifications as a naturalized national for three years from the day of the recovery of his (or her) Chinese nationality.[50] Under the former nationality laws, such disqualifications could be removed by permission of the proper authorities.[51] There is, however, no such a provision in the Nationality Law of 1929.

Revocation of Voluntary Expatriation Certificate

Still another mode of acquiring Chinese nationality is through the revocation of a voluntary expatriation certificate, which is not exactly the same as redintegration. According to Article 8 of the Rules for the Enforcement of the Nationality Law of 1929,[52] if a person has lost Chinese nationality by permission of the Ministry of the Interior, and if it is later discovered that such permission was gotten in violation of the rules prescribed in the Nationality Law, the certificate of voluntary expatriation obtained from the Ministry of the Interior shall be revoked. Should this occur, such a person would recover his (or her) Chinese nationality automatically.

III. Modes of Losing Chinese Nationality

Four modes of losing Chinese nationality are recognized by the present Nationality Law of 1929. They are: by marriage, by legitimation, by voluntary expatriation, and through revocation of a naturalization or redintegration certificate.[53]

48 See Arts. 3, 11, 16.
49 See Arts. 8, 16, 17.
50 See Art. 18; also *supra*, pp. 89-91.
51 See Nationality Law of 1909, Art. 23; Nationality Law of 1912, Art. 20; Nationality Law of 1914, Art. 20.
52 *C.L.C.R.*/2, Vol. 2, pp. 1050-1051.
53 The Nationality Law of 1909 provided that a Chinese child living under the parental care of an alien step-father should lose his (or her) Chinese nationality (Art. 13, No. 2),

Marriage

The Nationality Law of 1929 provides that the following person shall lose Chinese nationality:

"Being the wife of a foreigner and having obtained permission from the Ministry of the Interior to renounce her nationality on her application." [54]

In other words, a Chinese woman does not automatically lose her Chinese nationality through marriage to a foreigner, but does so only with her own consent and upon her own application. According to the nationality laws promulgated in 1909,[55] 1912,[56] and 1914,[57] a Chinese woman lost her Chinese nationality if she became the wife of a foreign national and thereby acquired the husband's nationality. Comparatively speaking, the present nationality law is more liberal in this respect.

Legitimation

According to the Nationality Law of 1929, the loss of Chinese nationality through legitimation is applied to the following persons:

"One whose father is an alien and has recognized him (or her) as his child;
"One whose father is unknown, or has not recognized him (or her) as his

but this provision is omitted in the Nationality Law of 1929. According to the nationality laws promulgated in 1912 and 1914, a Chinese national, who became, without the consent of the Chinese government, a civil official or performed military service in a foreign country, should lose his (or her) Chinese nationality. The Nationality Law of 1929 does not, however include such a provision.

Option as a mode of losing Chinese nationality was acquiesced in by China in the Treaty of Peace concluded between China and Japan, signed at Shimonoseki, April 17, 1895. In the Treaty, China recognized the principle that the inhabitants of ceded territories should have the right of option, i.e., to choose whether they would retain their former nationality by moving out of such territories, or would acquire the nationality of the annexing country. Article 5 of the Treaty provided:

"The inhabitants of the territories ceded to Japan who wish to take up their residence outside the ceded districts shall be at liberty to sell their real property and retire. For this purpose a period of two years from the date of the exchange of the ratifications of the present Act shall be granted. At the expiration of that period those of the inhabitants who shall not have left such territories shall, at the option of Japan, be deemed to be Japanese subjects." (Hertslet, Vol. 1, p. 364.)

Thus, by the Treaty, it was provided that, at the expiration of a period of two years, inhabitants remaining in the ceded territories should be deemed, at the option of Japan, Japanese subjects. They might, however, retain Chinese nationality if they moved out of such territories before the expiration of the prescribed period. Therefore, by implication, they really had the right of option to choose either Chinese or Japanese nationality.

[54] Art. 10, No. 1.
[55] Art. 13, No. 1.
[56] Art. 12, No. 1.
[57] Art. 12, No. 1.

child; and whose mother is an alien and has recognized him (or her) as her child." [58]

Such persons are confined to children who have not attained majority according to the Chinese law.[59]

Voluntary Expatriation

Chinese nationality was formerly based upon the principle of indissoluble natural allegiance.[60] Since the promulgation of the first nationality law in 1909, however, voluntary acquisition of foreign nationality by a Chinese national has been legally permitted.[61] Article 11 of the Nationality Law of 1929 reads:

"One who wishes to acquire the nationality of a foreign country may be permitted by the Ministry of the Interior to renounce his (or her) Chinese nationality provided that he (or she) is more than twenty years of age and has legal capacity under the Chinese law."

The Nationality Law of 1929 is more liberal than the former laws, so far as the status of women and children is concerned. No provision is contained in the present law prohibiting the voluntary expatriation of a married woman during the life time of her husband, but such freedom was not allowed by the law of 1909.[62] Furthermore, according to the present law, voluntary expatriation by a man does not extend to his wife and children. This is essentially different from the provisions in the former nationality laws.[63]

[58] Art. 10, Nos. 2, 3.

[59] See Art. 10, Par. 2.

[60] In his dispatch to Mr. Bayard, July 9, 1888, Mr. Denby wrote:
" . . . under recent statutes no Chinese subject can be naturalized." (*U. S. For. Rel.*, 1888, Pt. I, p. 320.)
For the punishment of the Chinese who renounced their allegiance, see *ibid.*, 1880-81, pp. 301, 302.

[61] For details, see the dispatch sent by the Commissioner for Foreign Affairs to the American Consul at Foochow, March 27, 1911, concerning the policy of the Chinese government toward naturalization of Chinese by other countries. (*U. S. For. Rel.*, 1911, pp. 64-66).

[62] Article 15 of the Nationality Law of 1909 reads:
"A married woman during the life time of her husband cannot alone apply for a discharge."

[63] Article 14 of the Nationality Law of 1909 reads:
"The voluntary expatriation acquired by a man extends to his wife and minor children, unless the wife desires to retain Chinese nationality or unless the discharged man desires his

Revocation of Naturalization or Redintegration Certificate

According to the Rules for the Enforcement of the Nationality Law of 1929, if a person has acquired Chinese nationality through naturalization or redintegration by permission of the Ministry of the Interior, but such permission has been obtained in violation of the rules laid down in the nationality law and such fact is later discovered, the certificate of naturalization or redintegration shall be revoked.[64] In this way, a person may automatically lose Chinese nationality.

Restrictions upon the Loss of Chinese Nationality

In order to prevent abuses out of the transference of nationality, the Nationality Law of 1929 lays down the rule that the following persons are not qualified to lose their Chinese nationality through marriage, legitimation, or voluntary expatriation:[65]

(1) One who has attained military age, is not exempted from military service, and has not yet served in the army;

(2) One who is in the active service of the army;

(3) One who is a Chinese civil or military officer;[66]

(4) One who is a suspect or an accused in a criminal case;

(5) One who has been sentenced and the execution of whose sentence has not been finished;

(6) One who is a defendant in a civil case;

(7) One against whom a compulsory execution has been ordered and has not yet been entirely carried out;

(8) One who has been adjudged a bankrupt and whose bankruptcy has not been discharged by an order of court;

(9) One who has delayed in the payment of taxes or who has suffered penalty because of his delay in the payment of the same, such penalty having not yet been discharged.

minor children to retain Chinese nationality in which case they remain Chinese on petition to the authorities."

Article 15 of the Nationality Law of 1912 and that of 1914 read:

"The wife of a denaturalized person and his children under full age shall, in the case of such wife and children acquiring foreign nationality together with him, thereby lose Chinese nationality."

[64] Art. 8.

[65] Arts. 12, 13.

[66] The first three disqualifications are especially applied to such persons who voluntarily renounce their Chinese nationality and who are above twenty years of age and have legal capacity under the Chinese law. See Arts. 11, 12.

The above rule laid down by the Nationality Law of 1929 has not been strictly observed by the local authorities. Chinese nationals living in coast areas have tried to acquire foreign nationality and renounce Chinese nationality in order to avoid bankruptcy and other suits. The abuses have been so serious that the Ministry of the Interior had to issue a circular instruction on January 31, 1930, advising the provincial authorities to pay special attention to the above regulation.[67]

Persons who have lost Chinese nationality through marriage, legitimation, or voluntary expatriations, must surrender the rights and privileges which Chinese nationals can enjoy. Furthermore, properties which have been owned by such persons as a result of the rights and privileges ascribed to Chinese nationals must be disposed of in favor of a Chinese national or nationals. Otherwise, such properties must be turned into the national treasury.[68]

IV. Some Special Nationality Problems

Double or Multiple Nationality

As a result of the conflict of the two systems of determining nationality by birth—*jus sanguinis* adopted by China and *jus soli* emphasized by several other countries, such as the United States and Great Britain—persons of Chinese origin are very likely to have double nationality. Thus, in the case of *United States v. Wong Kim Ark*, decided by the Supreme Court of the United States in 1898,[69] Wong was of both Chinese and American nationality. It is even not improbable that a Chinese may have quadruple nationality if he (or she) is born of a Chinese father and a Turkish mother on board a British vessel in a port of the United States.[70] At the

[67] *C.L.C.R.*/1, Vol. 3, p. 89.

[68] See Art. 14.

[69] 169 U. S. 649, 18 S. Ct. 456.

[70] According to the Turkish nationality law of 1928, children born in Turkey or abroad of a Turkish father or a Turkish mother are Turkish citizens. (Art. 1.) According to the British Nationality and Status of Aliens Act of 1914, amended in 1918 and 1922, any person born on board a British ship whether in foreign territorial waters or not shall be deemed to be a natural-born British subject. (Art. 1, No. (*c*).) According to the Constitution of the United States, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. (14th Amendment, Sec. 1.)

same time, naturalization is another source of double nationality because of diverse practices of China and other countries.

As a matter of practice, China follows the policy that Chinese people of double nationality should be subject to the jurisdiction of the country wherein they are domiciled. This attitude can be shown by the Notes annexed to the Consular Convention Relative to the Possessions and Colonies of the Netherlands, concluded between China and the Netherlands, on May 8, 1911.[71] The following is an extract from the Note sent by the Netherlands Minister at Peking to Lou Tseng Tsiang, Envoy Extraordinary and Minister Plenipotentiary of China to the Netherlands, temporarily at Peking:

"The Consular Convention that we have signed today speaks in several places of 'Chinese subjects' and of 'Netherlands subjects'.

"In consequence of differing legislation of our two countries in the matter of nationality, these expressions might give rise to doubts that it seems preferable to dispose of at this time. For this purpose I have the honor to propose to your Excellency that it should be agreed on either side that in the application of the present convention, which has no other purpose than to determine the rights, duties, etc. of the Chinese consular officials in the possessions of the Netherlands, the doubts to which these two expressions might give rise will be settled, in the possessions and colonies of the Netherlands, in conformity with the legislation in force in those possessions or colonies." [72]

In response to the Netherlands Minister at Peking, Mr. Lou fully agreed with his opinion:

". . . . the doubts to which the expressions 'Chinese subjects' and 'Netherlands subjects' might give rise will be settled, in the possessions and colonies of the Netherlands, in conformity with the legislation in force in those possessions or colonies." [73]

The nationality of Dutch-born Chinese was a very controversial problem.[74] By an exchange of notes, a compromise was eventually reached. Professor H. F. MacNair remarks: "A Chinese born in Dutch possessions is considered to be a Dutch subject as long as he resides in such possessions." "On returning to China," he continues, "if a native of that country, or on entering China, if born in

[71] MacMurray, Vol. 1, pp. 856-861.
[72] *Ibid.*, Vol. 1, p. 860.
[73] *Ibid.*, p. 861.
[74] *Supra*, pp. 85-86.

the Indies, the *jus sanguinis* revives *ipso facto*. Dutch-born Chinese residing in third countries are free to choose their nationality."[75]

Nevertheless, China apparently considers it her right to afford diplomatic protection to her nationals even when they are residing in another State whose nationality they also possess. Thus, at the First Conference for the Codification of International Law, held at The Hague in 1930,[76] the Chinese delegate during the discussion at the First Committee (Committee on Nationality) objected to the following principle proposed by the Preparatory Committee for the Conference:

"A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." [77]

Statelessness

Due to the revocation of a naturalization or redintegration certificate as provided in the Rules for the Enforcement of the Chinese Nationality Law of 1929,[78] a person may become stateless if the law of the country of his (or her) previous nationality provides that through naturalization or redintegration in a foreign country a

[75] H. F MacNair, "Chinese Acquisition of Foreign Nationality," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 7 (1922), No. 4, pp. 6-7.

[76] The First Conference for the Codification of International Law, at which China was represented, achieved more on the subject of nationality than on any others. It succeeded in drawing up a convention on certain questions relating to the conflict of nationality laws, a protocol relating to military obligations in certain cases of double nationality, a protocol relating to a certain case of double nationality, a protocol relating to a certain case of statelessness, and a special protocol relating to statelessness. A number of difficult nationality problems were to a certain extent settled at the Conference. The Chinese delegate was Vice-Chairman of the First Committee (on nationality). For texts of the convention and protocols, see League docs. C. 224. M. 111. 1930. V.; C. 225. M. 112. 1930. V.; C. 226. M. 113. 1930. V.; C. 227. M. 114. 1930. V.; C. 228. M. 115. 1930. V.; C. 229. M. 116. 1930. V.; C. 351 (a). M. 145 (a). 1930. V.; *Am. Jour. Int. Law*, Vol. 24 (1930), Supp., pp. 9-25, 169-233. For comment, see R. W. Flournoy, "Nationality Convention, Protocols and Recommendations adopted by First Conference on Codification of International Law," *ibid.*, Vol. 24 (1930), No. 3, pp. 467-485; M. O. Hudson, "Hague Convention of 1930 and Nationality of Women," *ibid.*, Vol. 27 (1933), No. 1, pp. 117-122; J. V. Houtte, "La codification des lois sur la nationalité a la conférence de la Haye," *Rev. Droit Int. et Légis. comp.*, Vol. 58 (1931), No. 1, pp. 103-119.

[77] League doc. C. 229. M. 116. 1930. V., p. 4; C. 351 (a). M. 145 (a). 1930. V., p. 265. It is interesting to note that the British Minister at Peking, by the authority vested in him by Section 85 of "The China and Japan Order in Council, 1865," declared and ordered, on October 6, 1868, that all British subjects of Chinese descent should, while residing or being in Chinese territory, discard the Chinese costume whereby they might readily be distinguished from the native population. Otherwise, they could not be entitled to claim British protection in any Court of Justice or elsewhere in the Chinese dominions. See *Br. and For. St. Papers*, Vol. 69 (1877-78), pp. 1100-1101.

[78] Art. 8. See *supra*, p. 97.

person shall *ipso facto* lose his (or her) nationality. The Chinese attitude toward the problem of such stateless persons can be shown by the *voeu* proposed by the Chinese delegation at the First Committee of the First Codification Conference of International law in 1930:

"The Conference recommends States to examine whether it would be desirable that, in cases where a person loses his nationality without acquiring another nationality, the State whose nationality he last possessed should be bound to admit him to its territory, at the request of the country where he is, under conditions different from those set out in the Special Protocol relating to statelessness, which has been adopted by the Conference." [79]

[79] League doc. C. 229. M. 116. 1930. V., p. 3.

CHAPTER V

DIPLOMATIC INTERCOURSE

Intercourse between States is essential to the existence of the family of nations. Customary rules regulating interstate relations in China can be traced as early as the Chou dynasty (1122-249 B.C.).[1] At that period, diplomatic intercourse between the semi-independent States in China was maintained through special envoys. Although there were no permanent ambassadors or ministers residing at the capitals of such States, various special missions were sent out by one State to another for the purpose of strengthening friendly relations, expressing sympathy for misfortunes, or attending various ceremonies.[2] Beginning with the Han dynasty (206 B.C.—A.D. 221), diplomatic intercourse between China and other sovereign States became more frequent.[3] But the foreign relations of China in the modern period began formally in 1689, when she concluded the Treaty of Nerchinsk with Russia for the delimitation of boundaries between the two countries.[4]

I. Representative Power of the Head of the State

The foreign relations of each State are generally conducted by the head or heads of the State either directly or indirectly through subordinates. It is within the competence of the constitutional law of each State to decide whether or not the titular head of the State should exercise actual powers of government.

During the monarchical period in China, the Emperor had absolute power to represent the State in dealing with foreign coun-

[1] See W. A. P. Martin, "Traces of International Law in Ancient China," *The International Review*, Vol. 14 (1883), January, pp. 63-77; R. S. Britton, "Chinese Interstate Intercourse before 700 B.C.," *Am. Jour. Int. Law*, Vol. 29 (1935), No. 4, pp. 616-635; Ch'eng Te-hsu, "International Law in Early China," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 11 (1927), No. 1, pp. 38-56, No. 2, pp. 251-270. For the study of primary sources of the rudimentary principles of international law in ancient China, see Tso Chiu-ming and Confucius, *Tso Chuan and the Annals of the Spring and Autumn*; and also *Chou Li*, which was regarded by W. A. P. Martin as the basis of the laws regulating the relations among the States during the Chou dynasty.

[2] See *infra*, p. 116, n. 76.

[3] See Wu Hung-chu, "China's Attitude towards Foreign Nations and Nationals Historically Considered," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 10 (1926), No. 1, pp. 13-45.

[4] Yen Wei-ching, "How China Administers Her Foreign Affairs," *Am. Jour. Int. Law*, Vol. 3 (1909), No. 3, p. 537.

tries. Upon the establishment of the Republic in 1912, the President of the central government became the representative of the State and had the power to direct Chinese foreign relations subject to certain constitutional provisions. According to the Provisional Constitution promulgated by the National Council at Nanking, March 10, 1912,[5] the Provisional President should, representing the State, receive ambassadors and ministers of foreign countries,[6] and should have power, with the concurrence of the National Council, to declare war, negotiate peace, and conclude treaties.[7] In the appointment of ambassadors and ministers accredited to foreign countries, the President was required to have the concurrence of the National Council.[8] The Provisional Constitution of 1912 was later superseded by the Permanent Constitution of the Republic of China, promulgated on October 10, 1923,[9] in accordance with which the President should be the representative of the Republic in foreign intercourse,[10] and should, with the concurrence of Parliament, have the power to declare war.[11] In regard to measures of defense against foreign invasion, he should even request the approval of Parliament after the declaration of war.[12] Under the same Constitution, the President was empowered to conclude treaties; but treaties of peace and those affecting national legislation should not become valid until the consent of Parliament was obtained.[13] The Constitution placed no restriction upon the power of the President in appointing ambassadors and ministers.[14]

The Permanent Constitution of 1923 was never legally recognized by the Revolutionary Government in South China. When the Peking regime was crushed by the revolutionary army, the Nationalist government promulgated the Organic Law of the National Government of the Republic of China on October 8, 1928.[15] This Law was formulated on the basis of the principles of Dr. Sun Yat-

[5] Its text can be found in *China Year Book*, 1914, pp. 460-464.
[6] Art. 37.
[7] Art. 35.
[8] Art. 34.
[9] No official translation of the Permanent Constitution has been issued. The English text translated by M. T. Z. Tyau can be found in *China Year Book*, 1925-26, pp. 694-705.
[10] Art. 83.
[11] Art. 84.
[12] *Idem.*
[13] Art. 85.
[14] Art. 81.
[15] Its text can be found in *China Year Book*, 1929-30, pp. 709-712.

sen, especially those formulated in *The Three People's Principles* and *The Five-Power Constitution*.[16] According to the terms of the new Organic Law, the Chairman of the National Government was only a nominal head. He was to represent the State in receiving foreign diplomatic representatives, while the power to declare war, negotiate peace and conclude treaties was vested in the National Government as a whole, composed of the Executive *Yuan*, the Legislative *Yuan*, the Judicial *Yuan*, the Examining *Yuan*, and the Supervisory *Yuan*.[17] This is the legal interpretation of the Organic Law of 1928. Practically, the National Congress of the Nationalist Party wields the highest power of directing the foreign relations of the State. During the period of its adjournment, the Central Executive Committee of the Party exercises this power. As a link between the Central Executive Committee and the National Government, the Central Political Council has been instituted. This Council prescribes, under the direction of the Central Executive Committee of the Party, the fundamental policies of the National Government, including foreign relations.[18]

Having brought the Revolution from the state of military dictatorship to that of political tutelage,[19] the National Government

[16] Dr. Sun was founder of the Nationalist Party and father of the Chinese Republic. For his revolutionary career and achievement, see the present writer's *The Nationalist Movement in China*, Chs. 3-7. Dr. Sun's principal works, which form the basic literature of the principles and program of the Nationalist Party, are the following:

(a) *The Three People's Principles* (or *San Min Chu I*),
(b) *The Five-Power Constitution* (or *Wu Ch'uan Hsien Fa*),
(c) *The Program of National Reconstruction* (or *Chien Kuo Fang Lo*),
(d) *The Outline of National Reconstruction* (or *Chien Kuo Ta Kang*),
(e) *The Manifesto of the First National Congress of the Nationalist Party.*

These works can be found in *The Collected Works of Sun Yat-sen*, 4 vols., compiled by the Tai-chung Press, 1929. For a brief discussion of these works, see the present writer's same work, Ch. 4, Sec. 3; Ch. 5. For a summarized interpretation of the essentials of *The Three People's Principles* and of the operation of *The Five-Power Constitution*, see the present writer's *What Are the Three People's Principles?*

[17] See the Organic Law of 1928, Arts. 3, 5, 8. For the organizations and functions of the Nationalist Party and the National Government, see the present writer's *The Nationalist Movement in China*, Ch. 7, Secs. 1, 2, 4, 5.

[18] See *ibid.*, Ch. 7, Sec. 4.

[19] The revolutionary scheme laid down by Dr. Sun Yat-sen was divided into three distinct stages or periods, namely, (1) the period of military dictatorship; (2) the period of educational or political tutelage; and (3) the period of constitutional government. During the first period, all civil and military affairs in the territories captured by the revolutionary forces should be controlled by the military government, which, in turn, should co-operate with the people in doing away with the old political and social evils. The first period should be limited to three years. Then should follow the period of political tutelage, the aim of which is to teach the common people how to exercise political power and to perform their duties.

convoked, in May, 1931, the historically famous National People's Conference, which, in turn, deemed it necessary to promulgate a Provisional Constitution (or Yueh Fa) for the general observance of the people before the promulgation of a permanent constitution. The Provisional Constitution was promulgated by the National Government on June 1, 1931, and is still in force.[20] With slight verbal changes, the articles on foreign relations are the same as those in the Organic Law of 1928.[21] The Organic Law of 1928 had been revised several times,[22] and according to that promulgated in December, 1932, the Chairman of the National Government represents the State but has no actual political power. The power to declare war, negotiate peace, and conclude treaties is vested in the National Government as a whole, but chiefly in the Executive *Yuan* and the Legislative *Yuan*. Furthermore, the appointment and removal of diplomatic officers are within the competence of the Executive *Yuan*.[23] According to the Final Draft of the Permanent Constitution, promulgated by the National Government on May 5, 1936,[24] the President of the Republic would have a large degree of discretionary power in directing foreign relations.[25] But its adoption has been postponed due to the present undeclared war in China.

II. Governmental Organ Directing Foreign Relations

Tsung-li Yamen

Although the international relations of China with modern States began as early as the seventeenth century, there had not then been established by the Chinese government any regular organ for directing foreign affairs. The Board of Rites, the Superintendency of Dependencies, the Governor of Lia-Kua provinces, and later Governors of other coastal provinces were responsible for carrying

As soon as this heavy task is accomplished within a term of three years, the third period should begin and all national and local affairs should be administered by organs created by the constitution. For details, see Sun Yat-sen's *The Outline of National Reconstruction*.

[20] Its text can be found in *China Year Book*, 1931-32, pp. 688-690.

[21] See Arts. 66, 67, 71.

[22] The Organic Law of 1928 was first revised on November 24, 1930, and then revised on June 15, 1931. In pursuance of the provisions of the Provisional Constitution of 1931, it was again put into revision on December 30, 1931. The text of the Organic Law of 1932 can be found in *China Year Book*, 1933, pp. 398-400.

[23] See Arts. 4, 11, 24, 27.

[24] Its text can be found in *China Year Book*, 1938, pp. 518-523.

[25] See Arts. 36, 39, 42.

on foreign relations in one way or another.[26] It was not until 1861 that a central organ, called Tsung-li Yamen,[27] in charge of foreign affairs was instituted by an Imperial Edict of January 19.[28]

The Tsung-li Yamen was supervised by a number of Ministers appointed by the Throne, most of them being Princes, Grand Councillors, Grand Secretaries, and Ministers of various government departments. Because of its rudimentary organization, the Yamen did not work satisfactorily in the early years. In 1864, it was reorganized and divided into the following five bureaus:

(1) the English Bureau, which took charge of affairs concerning England, Austria, international commerce, and the maritime customs;

(2) the French Bureau, which took charge of affairs concerning France, Holland, Spain, Brazil, religion, and emigration;

(3) the Russian Bureau, which took charge of affairs concerning Russia, Japan, overland trade, frontier defence, boundaries, national ceremonies, reception of guests, official movements, and civil examinations;

(4) the American Bureau, which took charge of affairs concerning the United States of America, Germany, Peru, Italy, Sweden, Norway, Belgium, Denmark, Portugal, treaty ports, labor protection, and international conferences;

(5) the Bureau of Naval Defence, which took charge of affairs concerning the navy forts, dock-yards, the purchase and maintenance of steamships, arms and ammunitions, mechanical inventions, telegraphs, railways, and mines.[29]

The Nanyang and Peiyang High Commissioners, who took charge of the management of the coastal provinces, were responsible, in

[26] See Chu Tsou-min, "A Study of the Changes of the Chinese Governmental Organ Directing Foreign Affairs," *Rev. For. Affairs* (Chinese), Vol. 4, (1935), No. 5, pp. 73-75. For details, see Chang Tsun-fai, "The Governmental Organ and Its Process of Directing Foreign Affairs during the Ch'ing Dynasty before the Opium War," *Foreign Affairs* (Chinese), Vol. 2 (1933), No. 2, pp. 1-7; the same author, "The Governmental Organ and Its Process of Directing Foreign Affairs during the Ch'ing Dynasty since the Opium War to the War between China and the Allied Powers of Great Britain and France," *ibid.*, Vol. 2 (1933), No. 5, pp. 43-51.

[27] Its full title should be Tsung-li Ko-kuo Shih-wu Yamen.

[28] The establishment of the Tsung-li Yamen was suggested and encouraged by the British Minister to China. See *Ch'ou Pan Yi Wu Shih Mo* (hereafter cited as *Chinese For. Rel., 1836-1874*), Vol. 71; Chang Tsun-Fai, "The Factors Prompting the Organization of the Tsung-li Ko-kuo Shih-wu Yamen," *Foreign Affairs* (Chinese), Vol. 3 (1933), No. 1, pp. 1-11.

[29] Chang Yu-chuan, "The Organization of the Waichiaopu," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 1 (1916), No. 1, p. 32.

co-operation with the Tsung-li Yamen, on matters of international relations. It is quite evident that the organization of the Tsung-li Yamen was not very efficient and that the power of managing foreign affairs was still not concentrated in one organ. At the same time, the Princes and Ministers supervising foreign affairs within the sphere of the Yamen were engaged with many other duties and naturally they could not work efficiently. For these reasons, foreign nations experienced inconvenience in diplomatic intercourse with the Chinese government. The re-organization of the Tsung-li Yamen was, therefore, only a matter of time.

Wai-Wu Pu

As a result of the Boxer Uprising in 1900, the foreign Powers seized the opportunity to press China to reorganize the Tsung-li Yamen. The Final Protocol concluded between China and the Allied powers, for the settlement of the disturbances of 1900, on September 7, 1901,[30] provided in Article XII:

"An Imperial Edict of the 24th of July, 1901 (Annex No. 18), reformed the Office of foreign affairs (Tsung-li Yamen), on the lines indicated by the Powers, that is to say, transformed it into a Ministry of foreign affairs (Wai-wu Pu), which takes precedence over the six other Ministries of State. The same edict appointed the principal members of this Ministry." [31]

The following is an excerpt from the Imperial Edict of July 24, 1901:

"The creation of offices and the determination of their duties has until now been regulated by the requirements of the times. Now, at the present time, when a new treaty of peace is concluded, international affairs take the first place among important business, and it is more than ever necessary to have recourse to competent men to devote themselves to all that relates to establishing friendly relations and confidence in speech.

"The Office of Foreign Affairs, formerly created to treat international questions, has been in existence, it is true, for years, but, in view of the Princes and Ministers composing it only discharging for the most part their functions accessorily with others, they could not devote themselves to them exclusively. It is naturally, therefore, proper to create special functions, so that each one may have his particular attributions.

[30] MacMurray, Vol. 1, No. 1901/3. The Allied Powers were composed of Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain, and the United States.

[31] *Ibid.*, p. 284.

"We command, in consequence, that the Office of Foreign Affairs (Tsung-li Ko-kuo Shih-wu Yamen) be changed into a Ministry of Foreign Affairs (Wai-wu Pu) and take rank before the six Ministries. And we designate Yi-K'uang, Prince Ch'ing of the first rank, as President of the Ministry of Foreign Affairs." [32]

The business of the Wai-wu Pu established by the Imperial Edict was distributed among four bureaus: (1) the Bureau of Harmonious Intercourse, which took charge of treaties, memorials to the Throne from the Ministry and from envoys abroad, the appointment of envoys and their staffs, the arrangement of their audiences to foreign ministers, the bestowal of decorations, promotions in the Ministry, and international questions arising in Peking; (2) the Bureau of Industrial Matters, which took charge of railways, mines, telegraphs, machinery, arms manufacture, shipping, foreign employees, labour emigration and educational missions abroad; (3) the Bureau of Customs and Accountancy, which took charge of the maritime customs, commercial affairs, navigation, domestic and foreign loans, currency, postal service, expenditure of the Ministry and of legations and consulates abroad; and (4) the Bureau of Miscellanea, which took charge of boundaries, defence, missionary questions, travel, protection, foreign claims, contraband, police and mixed cases.[33] The Wai-wu Pu was clearly over-burdened with many matters not strictly relating to foreign relations, and later on it was gradually relieved of supervision of the maritime customs, the postal, telegraph and railway services, and naval matters, as a result of the establishment of some other ministries or departments.

Wai-Chiao Pu

When the Ch'ing dynasty was overthrown and the Republic was established in 1912, the Wai-wu Pu was again reorganized along Western lines and renamed Wai-chiao Pu. A minister was appointed to have the sole responsibility for the affairs of the Wai-chiao Pu, and the administrative work was managed by his various subordinates. Its organization has undergone several changes since 1912. In general, the Wai-chiao Pu under the Peking government

[32] MacMurray, Vol. 1, p. 306.

[33] See Chang Yu-Chuan, *op. cit.*, pp. 34-35. For details of the organization of the Wai-wu Pu, see *Ch'ing Chi Wai Chiao Shih Liao* (hereafter cited as *Chinese For. Rel.*, 1875-1911), Vols. 147-148.

was divided into bureaus according to subject matter, while under the Nationalist regime, it has been divided according to both geographical areas and subject matter. The present law governing the organization of the Wai-chiao Pu was first promulgated on December 8, 1928, and later revised on February 21, 1931.[34] It provides five bureaus,[35] the functions of which are as follows:

(1) the Bureau of General Affairs, which takes charge of the handling of mail and telegrams, promulgation of ministerial orders, custody of the ministerial seal, checking of personnel records, transfers and changes in the component services, publications and statistical work, protocol, budget making and accounting, custody of official properties, and other miscellaneous matters not within the sphere of other bureaus;

(2) the Bureau of International Affairs, which has the control of questions of commercial nature, determination of the duties of consulates and consular districts, investigation of trade and economic conditions abroad, protection of Chinese residents abroad, including students pursuing higher studies in foreign universities, questions relating to nationality, matters concerning foreigners entering and leaving Chinese territory, international agreements and conventions, and international expositions and related subjects;

(3) the Bureau of Asiatic Affairs, which takes charge of the following matters in relation with Soviet Russia and all Asiatic countries: political questions and negotiations, matters concerning foreign relations in respect to the army, finance, loans, and railways, protection and regulation of aliens residing in China, and the conclusion and interpretation of international treaties;

(4) the Bureau of European and American Affairs, which takes charge of the same matters in relation with countries in Europe, America, Australia, and Africa;

(5) the Bureau of Intelligence and Publicity, the function of which is self-explanatory and is much the same as that of the press bureau of other countries.[36]

Besides the five bureaus, special committees can be organized under the provision of article 5 of the present law, and a number

[34] For its text, see *The Collected Laws of the Chinese Republic*, Commercial Press, 1936 (hereafter cited as *C.L.C.R./2*), Vol. 1, pp. 326-327.

[35] Art. 4.

[36] Arts. 7-11.

of committees have been actually instituted. The Committee of Treaties takes charge of the studying and planning of the revision of treaties as well as the discussion of problems in relation to international law.[37] The Committee for the Academic Discussion of Foreign Relations is to discuss and suggest governmental foreign policies.[38] The Committee for the Discussion of the Reorganization of the Diplomatic and Consular Services is empowered to study the plan for the reorganization of the diplomatic and consular services and to investigate the financial conditions of the legations and consulates as well as to secure the payment of funds not duly paid to the legations and consulates.[39] Lastly, the Committee for the Examination of the Qualifications of the Diplomatic and Consular Officers is composed of the high officers of the Wai-chiao Pu for the purpose of raising the standards of the diplomatic and consular services.[40]

The Wai-chiao Pu is under the jurisdiction of the Executive *Yuan* of the National Government.[41] According to the Law governing the Organization of the Central Executive Committee of the Nationalist Party, enacted by the First Plenary Session of the Fifth Central Executive Committee, on December 6, 1935,[42] there is provided a Committee of Foreign Affairs under the Central Political Council to direct the foreign policy of the government.[43] Actually, the highest power of diplomacy is held by the Nationalist Party through the operation of the Central Political Council,[44] and the Wai-chiao Pu is merely an organ which acts under the direction of that Council through the medium of the Executive *Yuan*.

[37] The Temporary Regulations governing the Organization of the Committee of Treaties were promulgated on August 20, 1931. For its text, see *C.L.C.R.*/2, Vol. 2, p. 1243.

[38] The Regulations governing the Organization of the Committee for the Academic Discussion of Foreign Relations were promulgated by the Ministry of Foreign Affairs, on May 2, 1930. For its text, see *ibid.*, Vol. 2, pp. 1244-1245.

[39] The Regulations governing the Organization of the Committee for the Discussion of the Reorganization of the Diplomatic and Consular Services were promulgated by the Ministry of Foreign Affairs, on July 6, 1930. For its text, see *C.L.C.R.*/2, Vol. 2, p. 1245.

[40] The Temporary Regulations governing the Organization of the Committee for the Examination of the Qualifications of the Diplomatic and Consular Officers were promulgated by the Ministry of Foreign Affairs, on January 16, 1929, and revised on August 17, 1933. For its text, see *ibid.*, Vol. 2, p. 1252.

[41] The Revised Law governing the Organization of the Executive *Yuan*, promulgated by the National Government, on August 3, 1932, Art. 1. For the text of the Law, see *ibid.*, Vol. 2, pp. 280-281.

[42] For its text, see *ibid.*, Vol. 10, p. 861.

[43] Art. 6.

[44] *Supra*, p. 104.

III. Establishment of Chinese Permanent Missions Abroad

Temporary Missions

In order to achieve a better understanding between China and the Western Powers, the latter had constantly brought pressure upon the Chinese government to send permanent missions abroad.[45] Some of the enlightened Chinese statesmen, such as Wên Hsiang and Ch'ung Hou were quite favorable to this idea.[46] Although the Chinese government felt the need to know more about the West in order to formulate an intelligent foreign policy, only some temporary missions were sent in the following years. The Pin Ch'un mission was sent in 1866 by the Tsung-li Yamen to investigate conditions in Europe.[47] The efforts of the mission were successful, and the favorable attitude of the high officials toward the establishment of permanent missions abroad can be shown by the various replies to a secret Imperial Decree of 1867.[48]

The next temporary mission sent abroad was the well known Burlingame mission in 1867. Burlingame, just resigned as American minister to Peking, was highly respected in Chinese official circles. Two Chinese officials, Chin Kang and Sun Chia-ku, were appointed to accompany him as co-envoys.[49] The underlying motive for sending this mission to Europe and the United States was to persuade the Governments of the Treaty Powers not to exact too much from China in the course of the impending treaty revision. The mission departed from China early in 1868 and returned to Peking in November, 1870.[50] On the whole, it achieved a great deal, especially

[45] See *Correspondence Respecting Affairs in China, 1859-1860* (*British Parliamentary Papers*), pp. 255, 273; "Secret Letter" of the Tsung-li Yamen, October 12, 1867, *Chinese For. Rel., 1836-1874,* T'ung Chih section, L., 32a.

[46] See Knight Biggerstaff, "The Establishment of Permanent Chinese Diplomatic Missions Abroad," *Chinese Soc. and Pol. Sci. Rev.,* Vol. 20 (1936-37), No. 1, p. 4. It is well to note that Wheaton's *Elements of International Law* was introduced to the Tsung-li Yamen by Anson Burlingame, American Minister to Peking, in November, 1863.

[47] The Pin Ch'un mission left Peking on March 7, 1865, and visited nine European countries. His suite was composed of two foreigners from the Imperial maritime customs service, his son and three students of the T'ung Wen Kuan, a school established in Peking in 1862 by the Tsung-li Yamen to teach foreign languages and Western sciences. For details, see *Chinese For. Rel., 1836-1874,* XXXIX, 1a-2b; XLVI, 17b-18a; L, 28.

[48] See *ibid.,* L, 32a-32b; LI, 21a-21b; LII, 19b-20a, 26a-27a, 32b-33b; LIII, 4b-5a; LIV, 3a-3b, 8a-8b, 13a, 17b-18b; LV, 2b-3a, 12a-13a, 27a-27b, 34a, 39a-39b; LVI, 11a-11b.

[49] See *ibid.,* LI, 26b-28b; LII, 2a-2b.

[50] Burlingame died in St. Petersburg, during the mission's visit to Russia.

in view of the guarantee of toleration secured from the Governments of Great Britain, Prussia, and the United States.

In 1870, the Chinese government sent the Ch'ung Hou mission to France, for the purpose of expressing regret to the French government for the insult to the French flag and loss of French lives as a result of the Tientsin riot in June, 1870.[51]

Establishment of Permanent Missions

The fact that China was gradually tending to send diplomatic missions abroad can be further shown by the conversation between Wên Hsiang and William H. Seward, former Secretary of State of the United States, at Peking. In reply to Seward's suggestion of sending Chinese consuls abroad, Wên Hsiang said:

"That the Emperor had this in view, and the only difficulty in the way had been the want of men properly qualified to perform consular and diplomatic duties; but they were taking measures to educate youths to act as interpreters, and hoped soon to have men ready; they had sent one embassy abroad, whose chief was a foreigner, in order to prove to the Treaty Powers their friendly feelings, and represent to them the progress it was possible, in their view, to make; but they did not intend to send another, until fully qualified natives could take the charge of it." [52]

Both Tsêng Kuo-fan and Li Hung-chang, two great Chinese statesmen, during the later period of the Ch'ing dynasty, urged the government to send diplomatic and consular agents abroad in order to promote friendly relations with other countries and to protect Chinese interests overseas.[53] The Treaty between China and Japan, signed on September 13, 1871, was negotiated by Li on the part of China.[54] Although the exchange of diplomatic representatives was provided for in the Treaty, it was not put into practice until 1877. In 1873, Yung Wing and Ch'en Lan-pin were sent by the Chinese government to investigate the conditions of Chinese laborers in Peru and Cuba respectively.[55] The sending of permanent diplomatic agents abroad was further prompted by the Formosa incident in

[51] For details of the mission, see Knight Biggerstaff, "The Ch'ung Hou Mission to France, 1870-1871," *Nankai Social and Economic Quarterly*, Vol. 8 (1935), No. 4, pp. 633-647.

[52] *Legation Archives, China*, U.S. State Department No. 235, 144b. Here the word "embassy", designating the Burlingame mission, was somewhat misused.

[53] See *Chinese For. Rel., 1836-1874*, LXXIX, 48a-48b; LXXX, 11a-11b.

[54] *Treaties, Conventions, etc., between China and Foreign States* (2nd ed., Shanghai, 1917), Vol. 2, pp. 509-510.

[55] See *Chinese For. Rel., 1875-1911*, IV, 17b; *Chinese For. Rel., 1836-1874*, XCI, 27b-29b; H. B. Morse, *The International Relations of the Chinese Empire*, Vol. 2, pp. 179-180.

1874,[56] which showed the weakness of China in various respects. Memorials suggesting the establishment of Chinese legations and consulates abroad were presented to the Throne one after another by Li Hung-chang, Wang K'ai-t'ai,[57] and Li Tsung-hsi.[58] In 1875, Li and the Tsung-li Yamen submitted memorials to the Throne to take concrete action for the nomination of men as envoys to foreign countries.[59]

The establishment of permanent legations abroad was finally hastened by the Margary Affair, which occurred in Yunnan, in February, 1875.[60] Upon the request of Thomas Wade, British minister to China, to send a mission of apology to England as one of the conditions for the settlement of the Margary Affair,[61] the following Imperial Edict was issued:

"The expectant Vice-President of a Board, Kuo Sung-t'ao, and the expectant Intendant, Hsü Ch'ien-shên, shall be Imperial Commissioners to go to England as envoys. Hsü Ch'ien-shên shall be given the button of the second rank." [62]

For the final settlement of the Margary Affair, the Chefoo Treaty was concluded between Great Britain and China on September 13, 1876.[63] In relation to the sending of a mission of apology to England, the Treaty provided:

"When the case is closed an Imperial letter will be written, expressing regret for what has occurred in Yunnan. The Mission bearing the Imperial letter will proceed to England immediately. Sir Thomas Wade is to be informed

[56] In December, 1871, some ship-wrecked Japanese and Liuchiuan sailors were killed by the aboriginal tribes living in the mountainous region of Formosa. War between China and Japan was imminent. But, through British good offices, the incident was finally settled, requiring the Chinese government to pay half a million taels to Japan as an indemnity.

[57] Governor of Fukien province.

[58] Governor-general of the Liang Chiang provinces and Superintendent of Trade for the Southern Ports.

[59] See *U.S. For. Rel.*, 1875, I, p. 381; Chu Shou-p'êng, *Kuang Hsü Tung Hua Hsü Lu*, III, 15a-15b; IV, 7a-7b.

[60] For a full account of the Margary Affair and its negotiations, see Morse, *op. cit.*, Vol. 2, pp. 283-306; *Correspondence Respecting the Attack on the Indian Expedition to Western China and the Murder of Mr. Margary* (*British Parliamentary Papers*), *China*, No. 1 (1876), pp. 2, 6, 50-52, 63, 74, 76; *Further Correspondence Respecting the Attack on the Indian Expedition to Western China and the Murder of Mr. Margary* (*ibid.*), *China*, No. 3 (1877), pp. 111-147.

[61] See *Chinese For. Rel., 1875-1911*, I, 10b-13a; III, 7a-11a; *Correspondence Respecting the Attack On the Indian Expedition to Western China and the Murder of Mr. Margary* (*British Parliamentary Papers*), *China*, No. 1 (1876), pp. 50-52.

[62] *Chinese For. Rel., 1875-1911*, III, 15b. Liu Hsi-hung, a fifth grade expectant Director of one of the Four Minor Courts, was later appointed to take the place of Hsü Ch'ien-shên, who was made the first Chinese envoy to Japan on October 1, 1876.

[63] Hertslet, Vol. I, No. 12.

of the constitution of this mission, for the information of his Government. The text of the Imperial letter is also to be communicated to Sir Thomas Wade by the Tsung-li Yamen." [64]

The Mission arrived in London on January 21, 1877, and presented the letter of apology to Queen Victoria on February 7. Then it settled down as a permanent Chinese Legation in England. This first Chinese permanent legation was composed of two secretaries, two interpreters, and eleven attachés.[65]

As early as August, 1875, Li Hung-chang requested the Emperor to send Chinese diplomatic representatives to Peru to take care of the interests of the Chinese residing in that country.[66] On December 11, the Tsung-li Yamen presented a memorial to the Throne, suggesting the establishment of permanent missions in the United States, Peru and Spain.[67] In reply to this memorial, the following Edict was handed down:

"Ch'ên Lan-pin, a third/fourth grade expectant Director of one of the Four Minor Courts, a Secretary of the Grand Council, a Senior Secretary of the Board of Punishments, and wearer of the button of the second rank, and Yung Wing, a brevet third grade Sub-Prefect, shall be Imperial Commissioners to go to the United States, Spain, and Peru as envoys. Yung Wing shall be promoted to an Intendantship and shall receive the button of the second rank." [68]

The envoys did not go to their new posts until more than two years later. The credentials were presented to the United States, Spain, and Peru, on September 28, 1878, May 24, 1879, and April 17, 1880, respectively.[69]

On January 15, 1877, Ho Ju-chang was appointed chief envoy to Japan and Chang Szu-kuei was made assistant envoy.[70] On April 30,

[64] Sec. I, No. 6.

[65] See Chang Tê-i, *Sui Shih Jih Chi*, in Wang Hsi-ch'i, *Hsiao Fang Hu Chai Yü Tî Ts'ung Ch'ao*, Bk. XI, 21oa. Halliday Macartney, superintendent of the government arsenal at Nanking, 1865-1875, was appointed English secretary of the Legation.

[66] See *Chinese For. Rel., 1875-1911*, II, 17b-18a.

[67] See *ibid.*, IV, 17b-19a.

[68] *Ibid.*, IV, 19a. Ch'ên and Yung had travelled through the United States, Peru, and Cuba, and were well acquainted with the conditions of these countries.

[69] See Ch'ên Lan-pin, *Shih Mei Chi Lüeh*, in Wang Hsi-ch'i, *op. cit.*, Bk. XII, 57a, 67a, 75b, 76a-76b; *Chinese For. Rel., 1875-1911*, XV, 36b-37a; XXI, 1a-2a.

[70] See Chu Shou-p'êng, *op. cit.*, XIII, 13a, 21a. Ho, an expositor of the Hanlin Academy, was first appointed assistant envoy to Japan, October 1, 1876, when Hsü Ch'ien-shên, appointed as assistant envoy to Great Britain, was made chief envoy to Japan. Due to Hsü's transfer to the superintendency of the Foochow dockyards, Ho was promoted to Hsü's position. Chang was an expectant prefect.

1877, Liu Hsi-hung, an assistant envoy to Great Britain, was appointed the Chinese envoy to Germany, and, in November, he presented the letter of credence to the Kaiser in Berlin.[71] On March 14, 1878, Kuo Sung-t'ao was made Chinese envoy to France, a post to be held concurrently with that of envoy to Great Britain. On May 6, Kuo presented his credentials to the President of France in Paris.[72] On July 20, 1878, Ch'ung Hou was appointed envoy to Russia, and, on January 20, 1879, he presented a letter of credence to the Czar of Russia in St. Petersburg.[73]

Chinese Attitude Reviewed

The above historical study shows the development of the Chinese attitude toward diplomatic intercourse with foreign countries since the middle of the nineteenth century. At the beginning, China had no intention of entering into such intercourse at all. The sending of diplomatic missions abroad was flatly rejected, and even the residence of foreign envoys in Peking was grudgingly accepted under Western pressure.[74] Later, chiefly due to the necessity of knowing conditions in foreign countries so as to be able to formulate a sound foreign policy, enlightened statesmen submitted memorials to the Throne, suggesting the advisability of sending envoys abroad. There were, however, some obstinate officials who still took the attitude that China should not come into intimate contact with the foreign countries. Notwithstanding such opposition and other difficulties, such as the lack of appropriate persons suitable for diplomatic service, permanent missions were finally sent out to the foreign capitals in accordance with the general practice of the family of nations and the rules of international law governing diplomatic intercourse.[75]

71 See Chu Shou-p'êng, *op. cit.*, XV, 6b, 11b.

72 See Chang Tê-i, *op. cit.*, 273b, 276a, 277a, 277b.

73 See *Chinese For. Rel., 1875-1911*, XIII, 28b; Chang Tê-i, *Shih Ê Jih Chi*, in Wang Hsi-ch'i, *op. cit.*, Bk. III, 303-304. Ch'ung Hou was a Junior Guardian of the Heir Apparent, a Minister of the Tsung-li Yamen, a Senior Vice-President of the Board of Civil Office, and then acting as Tartar-General in Shênching, the capital of Manchuria.

74 See *infra*, pp. 130-132.

75 The writer is indebted to Knight Biggerstaff's article, "The Establishment of Permanent Chinese Diplomatic Missions Abroad," *op. cit.*, in getting the idea for the collection of material for this section.

IV. Kinds and Classification of Diplomatic Envoys

Kinds of Diplomatic Envoys

Diplomatic envoys can be generally divided into two kinds: special and permanent. Special envoys may be of several types, such as ceremonial and political. Ceremonial envoys are sent to foreign countries on occasions of coronations, weddings, funerals, and the like. The earliest examples of such ceremonial envoys sent by China can be traced during the period of the Chou dynasty.[76] This practice has been and is still followed by the Chinese government.[77] Special political envoys are sent for the purpose of achieving some particular political ends or for representing the sending State at international congresses or conferences. China has employed such envoys since ancient times.[78] The special missions of Burlingame, Yung Wing, Ch'ên Lan-pin, and Kuo Sung-t'ao are conspicuous examples of the first kind,[79] while the delegates sent by the Chinese government to attend the Hague Conferences of 1899 and 1907, the Conference for the Codification of International Law at The Hague in 1930, and the conferences sponsored by the League of Nations and the International Labour Organization are illustrations of the second kind.[80]

Classification of Diplomatic Envoys

Here only the permanent missions accredited from one State to another are under consideration. According to the practice of modern States, four classes are generally to be distinguished: first, Ambassadors; second, Ministers Plenipotentiary and Envoys Extraordinary; third, Ministers Resident; and fourth, Chargés d'Affaires.[81]

[76] The following are the examples: Lu sent a representative to Sung when the latter had a flood in 580 B.C., and also to Chu for consolation in a military defeat by Wu in 536 B.C. The marriage or funeral ceremonies of a State were also attended by special envoys sent by different States. When Duke Chin of Ts'in died in 536 B.C., his funeral service was attended by envoys from many States. At the coronation ceremony of Duke Chou of Tsin, envoys from Wei, Ch'eng and Tsi were presented. For details, see Ch'eng Te-hsu, *op. cit.*, pp. 49-51.

[77] For example, the Chinese government sent H. H. Kung, Minister of Finance, to London for the celebration of the coronation of King George VI in 1937.

[78] See Ch'eng Te-hsu, *op. cit.*, p. 54.

[79] *Supra*, pp. 111-114.

[80] Evidence can be found in the minutes and proceedings of such conferences.

[81] The first, second, and fourth classes were defined by the Congress of Vienna in 1815, and the third class was added by the Congress of Aix-la-Chapelle in 1818.

When China first sent permanent missions abroad, she did not follow this rule. At the very beginning, chief and assistant envoys were appointed to Great Britain, Japan, Spain, Peru, and the United States. This system soon proved unworkable. Friction between the two envoys accredited to the same country was not uncommon. Hence, later on, the envoys to Germany, France, and Russia were sent singly.[82]

Since the establishment of the Republic, China has gradually adopted the general practice of modern States in sending diplomatic agents abroad. However, ambassadors were not sent until 1924, when Soviet Russia and China agreed to raise their legations to embassies. As soon as the Nationalists came into power a program of promoting the Chinese legations in Great Powers to embassies was pursued. This program was largely motivated by the desire to increase China's prestige in the family of nations, and, as a result of skillful negotiations,[83] was successfully realized in 1934 and 1935. Thus today the Chinese envoys accredited to Soviet Russia, Italy, Japan, Great Britain, France, the United States, Germany, and Belgium are of the ambassadorial rank.

According to the Organic Law of Diplomatic Missions and Consulates Abroad, promulgated by the National Government on February 3, 1930,[84] Chinese diplomatic representatives are classified into ambassadors, ministers plenipotentiary, and chargés d'affaires.[85] The class of ministers resident is not provided therein. The ambassadors and ministers are accredited by the Head of the Chinese government, and the chargés d'affaires by the Chinese minister of foreign affairs to the minister of foreign affairs of the government to which they are accredited. If ambassadors or ministers have not yet arrived at their posts or have temporarily left their posts or have not yet been appointed for certain reasons, chargé d'affaires

[82] *Supra*, pp. 114-115.

[83] For the Nationalist program in this respect, see the section on foreign relations of the Political Program of the National Government during the Period of Political Tutelage, enacted by the second plenary session of the Third Executive Committee of the Nationalist Party, in July, 1929 (*C.L.C.R./2*, Vol. 1, pp. 10-14). For the general feature of negotiations and the exchange of notes, see *Foreign Affairs* (in Chinese), Vol. 5 (1934), No. 4, p. 173; *Rev. For. Affairs* (in Chinese), Vol. 4 (1935), No. 5, pp. 151-155.

[84] *C.L.C.R./2*, Vol. 2, pp. 1251-1252. Its English translation can be found in A. H. Feller and M. O. Hudson, *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, Vol. 1, pp. 280-282.

[85] Arts. 1, 5.

ad interim may be appointed.[86] Secretaries of the missions near the nations to which ambassadors or ministers are concurrently appointed may be designated by the Ministry of Foreign Affairs as chargés d'affaires.[87] As to the differences in rank and honors of the several classes of envoys, China follows the general rules of international law and the customary practice of the family of nations.

The Chinese delegation sent to the League of Nations is of a special nature.[88] The Chief of the Delegation Office is to handle the routine matters. Three plenipotentiary delegates are appointed or concurrently appointed from among the present ambassadors and ministers abroad by the National Government to attend the sessions of the League Assembly.[89]

Foreign Envoys in China

Before 1924, no diplomatic agent of ambassadorial rank was sent to China by foreign countries. It is the general international practice that the envoys exchanged between two sovereign States should be of the same rank. As China has promoted her legations in various countries into embassies,[90] these countries also appointed ambassadors to China at the same time. The foreign diplomatic envoys accredited to China, as to other countries, form a body, generally called the "diplomatic corps". Because this is in accordance with diplomatic usage, China has accepted it.[91]

V. Personnel of Diplomatic Missions

There is no rule of international law governing the personnel and organization of diplomatic missions. According to the Regulations

[86] Art. 6, Par. 3.

[87] Art. 6, Par. 1.

[88] For the text of the Organic Law of the Office of the Chinese Delegation to the League of Nations, promulgated by the National Government on February 3, 1930, see *C.L.C.R.*/2, Vol. 2, p. 1251. Its English translation can be found in A. H. Feller and M. O. Hudson, *op. cit.*, Vol. 1, p. 283.

[89] Arts. 1, 2.

[90] Such as Soviet Russia, Italy, Japan, Great Britain, the United States, Germany, France, and Belgium.

[91] See the correspondence between the minister of foreign affairs and the dean of the diplomatic corps in 1920, *China Year Book*, 1921-22, pp. 628-637; the dispatch sent by Chao Chu Wu, minister of foreign affairs of the revolutionary government in Canton, to Sir James W. Jamieson, British Consul-General in Canton, on September 5, 1923, concerning the Customs surplus, *ibid.*, 1924, p. 850; correspondence between the diplomatic corps and C. T. Wang, Minister of Foreign Affairs, on June 7, 1929, *ibid.*, 1929-30, pp. 902-903.

for the Guidance of the Chinese Envoys, presented by the Tsung-li Yamen for Imperial approval on October 28, 1876,[92] the number of secretaries, consuls, interpreters, and attachés in each legation was to be determined by the envoy himself, although a list of their names was to be brought to the Tsungli Yamen for its information.[93] When the first Chinese legation was established in London, the staff was composed of two secretaries, two interpreters, and eleven attachés.[94] According to the present Organic Law of Diplomatic Missions and Consulates Abroad, 1930, the organizations of the embassies, legations, and missions in charge of chargés d'affaires are as follows:

(1) Embassy: one counsellor, two or three secretaries, one or two attachés, and one to three chancellors;

(2) Legation: one to three secretaries, one or two attachés, and one to three chancellors;

(3) Mission in charge of chargé d'affaires: one or two secretaries.[95]

As to the respective functions of the counsellors, secretaries, attachés, and chancellors, the same Law provides:

(1) Counsellors—complying with the orders of ambassadors and assisting the latter in performing diplomatic functions and examining confidential matters;

(2) Secretaries—complying with the orders of ambassadors, ministers, or chargés d'affaires in handling confidential correspondence, conducting investigations, and making reports;

(3) Attachés—complying with the orders of their superiors in handling correspondence, conducting investigations, and making reports;

(4) Chancellors—complying with the orders of their superiors in handling files, recording, writing, and miscellaneous affairs.[96]

Besides the counsellors, secretaries, attachés, and chancellors, the Ministry of Foreign Affairs may assign officers, who have passed

[92] *U. S. For. Rel.* 1877, pp. 85-86.

[93] Art. 4.

[94] *Supra*, p. 114.

[95] Arts. 2, 16. The secretaries are again classified into first, second, and third grades. See the Temporary Regulations governing the Appointment of Diplomatic and Consular Officers, promulgated by the Ministry of Foreign Affairs, on August 10, 1933 (*C.L.C.R.*/2, Vol. 2, pp. 1252-1253), Art. 1, Sec. 1, Nos. 4-6.

[96] See Arts. 7-9, 16; also Regulations relating to the Functions of the Chancellors of the Diplomatic Missions Abroad, promulgated by the Ministry of Foreign Affairs, on September 27, 1934 (*C.L.C.R.*/2, Vol. 2, pp. 1255-1256).

examinations for foreign services or are in possession of equivalent knowledge, as students to the embassies and legations to learn diplomatic functions.[97] However, according to the Temporary Regulations relating to the Students Assigned to Diplomatic Missions and Consulates Abroad, promulgated by the Ministry of Foreign Affairs, on January 8, 1929,[98] such students can be assigned not more than four to each embassy and not more than two to each legation.[99] According to the Regulations relating to the Employment of Non-Commissioned Officers by the Diplomatic Missions and Consulates Abroad, promulgated by the Ministry of Foreign Affairs, on June 10, 1933,[100] the diplomatic missions may employ non-commissioned officers, such as clerks, translators, and typists.[101] The same Regulations provide that the diplomatic missions may employ advisers if necessary.[102]

In connection with the Chinese diplomatic services, there are military attachés and commercial attachés, who are not diplomatic officers but are attached to the embassies and legations. On September 15, 1930, the National Government promulgated the Regulations relating to the Military Attachés of Army, Navy, and Air Forces, Sent by the Board of General Staff of the Chinese Army to Diplomatic Missions Abroad.[103] According to the Regulations, the main purpose of sending military attachés abroad is to investigate the military conditions of the foreign countries.[104] Such attachés are classified into three grades: (1) military attachés, (2) associate military attachés, and (3) assistants.[105] They are attached to the embassies or legations in the countries to which they are sent.[106] If necessary, the Board of General Staff of the Chinese Army may send or designate among the military attachés a chief military attaché, whose function is to supervise the Chinese military attachés in several countries.[107] The number of military attachés sent to each

97 The Organic Law of Diplomatic Missions and Consulates Abroad, 1930, Art. 20.
98 *C.L.C.R.*/2, Vol. 2, pp. 1253-1254.
99 Art. 2.
100 *C.L.C.R.*/2, Vol. 2, p. 1254.
101 Art. 2; also the Organic Law of Diplomatic Missions and Consulates Abroad, 1930, Art. 21.
102 Art. 10.
103 *C.L.C.R.*/2, Vol. 3, p. 1341.
104 Art. 1.
105 Art. 5.
106 Art. 1.
107 Art. 6.

country depends upon the work necessary.[108] They comply with the orders of the Chief of the Board of General Staff of the Chinese Army and with the directions of the ambassadors or ministers.[109] They may, in turn, employ non-commissioned officers to assist in carrying out their work.[110]

According to the Regulations relating to the Commercial Attachés Sent by the Ministry of Industry to Diplomatic Missions Abroad, promulgated by the Ministry of Industry on February 29, 1936, and revised on April 14 of the same year,[111] commercial attachés are classified into the following three grades:

(1) Commercial counsellors—sent to embassies;

(2) Commercial secretaries—sent to embassies or legations; and

(3) Commercial commissioners—sent to foreign commercial centers besides the cities wherein the embassies or legations are established.[112]

The commercial attachés, complying with the orders of the Ministry of Industry and under the supervision and direction of the ambassadors or ministers, seek to protect and expand Chinese commercial or industrial interests as well as to investigate the commercial and industrial conditions of the countries or cities to which they are sent.[113] In carrying out their work, they may ask the co-operation of the Chinese consuls and may also employ secretaries and non-commissioned officers.[114]

The organization of the Office of the Chinese Delegation to the League of Nations is different from that of the ordinary embassies and legations. The Office has a chief to supervise the general administrative work.[115] In addition, there are one first secretary, one second secretary, one or two third secretaries, two attachés, and two chancellors, who comply with the orders of the chief to handle the

[108] Art. 3.

[109] The Organic Law of the Board of General Staff of the Chinese Army, promulgated by the National Government, on August 9, 1935 (*C.L.C.R.*/2, Vol. 1, pp. 288-289), Art. 2; Regulations relating to the Military Attachés of Army, Navy, and Air Forces, Sent by the Board of General Staff of the Chinese Army to Diplomatic Missions Abroad, 1930, Art. 2.

[110] Regulations relating to the Military Attachés of Army, Navy, and Air Forces, Sent by the Board of General Staff of the Chinese Army to Diplomatic Missions Abroad, 1930, Art. 8.

[111] *C.L.C.R.*/2, Vol. 10, p. 547.

[112] Art. 2.

[113] Arts. 3, 4.

[114] Arts. 4, 5.

[115] The Organic Law of the Office of the Chinese Delegation to the League of Nations, 1930, Art. 2.

routine affairs of the Office.[116] The Office may employ non-commissioned officers to do copying and recording work.[117] During the period of meetings of the League of Nations, the chief complies with the orders of the plenipotentiary delegates in handling all matters.[118]

VI. Appointment of Diplomatic Officers

The Organic Law of Diplomatic Missions and Consulates Abroad, 1930, provides that the appointment and dismissal of diplomatic officers shall be made by the Ministry of Foreign Affairs in accordance with laws and ordinances.[119] According to the Administrative Rules of the Ministry of Foreign Affairs, promulgated by the Ministry on February 20, 1936,[120] the Appointment Section of the Bureau of General Affairs of the Ministry of Foreign Affairs takes charge of the matters of appointment, dismissal, promotion, demotion, shifting, encouragement, and punishment of the personnel of the Chinese diplomatic missions abroad.[121] However, the diplomatic officers as indicated in the above Organic Law and the Administrative Rules do not include ambassadors and ministers, who are appointed by the Head of the National Government upon recommendation of the Ministry of Foreign Affairs, and upon subsequent confirmation of the Central Political Council.[122] The plenipotentiary delegates sent to the League of Nations are appointed or concurrently appointed from among experienced and prominent diplomats or from the present ambassadors and ministers abroad by the same method applied to ambassadors and ministers.[123]

In 1936, the Ministry of Foreign Affairs instituted the Committee for Examining the Qualifications of Diplomatic and Consular Officers. According to the rules governing the organization of this

116 Art. 3.
117 Art. 7.
118 Art. 2.
119 Art. 7.
120 *C.L.C.R.*/2, Vol. 10, pp. 97-101.
121 Art. 8, Sec. 2, No. 1.
122 See the Regulations governing the Organization of the Central Political Council, enacted by the first session of the Standing Committee of the Fifth Central Executive Committee of the Nationalist Party, on December 12, 1935 (*C.L.C.R.*/2, Vol. 10, pp. 862-863), Art. 3, No. 5; The Organic Law of Diplomatic Missions and Consulates Abroad, 1930, Art. 17.
123 The Organic Law of the Office of the Chinese Delegation to the League of Nations, 1930, Art. 1.

Committee, promulgated by the Ministry of Foreign Affairs on April 10, 1936,[124] the qualifications of diplomatic officers other than ambassadors and ministers, should be examined by the Committee.[125] The appointment of the diplomatic officers should be limited to those persons who have been recognized by the Committee as qualified, or who have passed the examinations for diplomatic and consular services.[126] At least half a year of service in the Ministry of Foreign Affairs is required of every diplomatic officer before being sent abroad.[127]

VII. Credentials, Reception and Audiences

Letters of Credence

It is the general practice of the nations that an ambassador or a minister accredited from one State to another carries a letter of credence, which is the document to designate his official position. China follows this practice.[128] Each Chinese envoy accredited to a foreign State receives a sealed letter of credence and an open copy. On his arrival, the open copy is first sent to the Foreign Office of

[124] *C.L.C.R./2*, Vol. 10, p. 179.

[125] Art. 2.

[126] The Temporary Regulations governing the Appointment of Diplomatic and Consular Officers, 1933, Art. 2. For details of the examinations, see the Regulations relating to the Higher Examination of Diplomatic and Consular Officers, promulgated by the Examining *Yuan*, on December 27, 1930, and finally revised on August 5, 1935 (*C.L.C.R./2*, Vol. 9, pp. 5669-5670); the Regulations relating to the Ordinary Examination of Diplomatic and Consular Officers, promulgated by the Examining *Yuan*, on September 3, 1935 (*Ibid.*, Vol. 9, p. 5677). Special courses on political science, economics, and particularly on diplomatic service are given by the Ministry of Foreign Affairs, for the purpose of training the officers of low rank. See the Regulations relating to the Training Classes for the Diplomatic and Consular Officers, promulgated by the Ministry of Foreign Affairs, on July 24, 1930 (*Ibid.*, Vol. 2, p. 1253).

[127] The Temporary Regulations governing the Appointment of Diplomatic and Consular Officers, 1933, Art. 8.

[128] The following is a sample of the letter of credence, issued by the Chinese government:

LETTER OF CREDENCE

President of the Republic of China
To His Excellency (or Majesty) the . of . ...
Sendeth Greeting.

Our Good Friend

Being desirous to maintain without interruption the relations of friendship and good understanding which happily subsist between China and ....., We have made choice of Our Trusty and Well-beloved Mr. ...., to reside with You in the character of Our Envoy Extraordinary and Minister Plenipotentiary.

The experience which We have had of Mr. .... 's talents and zeal for Our Service assures Us that the selection We have made will be perfectly agreeable to You;

that State. The sealed original is handed personally to the Head of its government. In the case of a chargé d'affaires, the letter of credence is from the Minister of Foreign Affairs of the Chinese government to the Minister of Foreign Affairs of another State.

The Chinese government considers the letter of credence as an essential proof of the official position of a foreign envoy. When Mr. Yoshizawa was appointed as Japanese minister to China and arrived at Peking in the Summer of 1923, he failed for certain reasons to present his letter of credence to the Head of the Chinese government, and even an open copy was not sent to the Ministry of Foreign Affairs. Hence Dr. V. K. Wellington Koo, Minister of Foreign Affairs, ignored his official position until the requirement was fulfilled in August of the same year.[129]

Persona Non Grata

Whereas practically every sovereign State recognizes both the right and duty of legation, it can refuse, as envoy from a foreign State, a person considered as *persona non grata.* The appointment of Mr. Henry W. Blair as American minister to China in 1891 was objected to by the Chinese government on the ground that Mr. Blair had helped to pass the amended Chinese Exclusion Act of 1888, when he was Senator of the United States.[130] Like many other countries, China follows the practice of ascertaining beforehand whether her appointee will be considered as *persona grata* by the State to which he is to be accredited.

and that he will discharge the duties of his Mission in such a manner as to merit Your Approbation and Esteem, and to prove himself worthy of this new mark of Our confidence.

We therefore request that You will give entire credence to all that Mr. shall communicate to You in Our name, more especially when he shall renew to You the assurances of the lively interest which we take in everything that affects the welfare and prosperity of

Given at , this day of in the year

(*Signed*)

(*Countersigned*)

(This sample is found in the *Dictionary of Words and Phrases of International Law and Diplomacy in English and French with Chinese Translations,* compiled by the Department of Treaties of the Ministry of Foreign Affairs of the Chinese Government, 1925, p. 152).

[129] For the statements issued by the Ministry of Foreign Affairs of the Chinese government and the Japanese Legation in Peking concerning this matter, see the *North-China Herald,* August 4, 1923, pp. 306-307.

[130] For details, see 52 Cong., 1st Sess., Senate Ex. Doc. 98 (1891-1892).

Reception and Audiences

If a State accepts a foreign envoy, he will be solemnly received in an audience with formal ceremonies. With the exception of a chargé d'affaires, who is received by the Minister of Foreign Affairs, there should be arranged a special audience with the attendance of the Head of the State, to whom the ambassador or minister delivers the sealed letter of credence personally. In respect to Court ceremony and audiences, there was much controversy between China and Western countries before the twentieth century.[131] By the Treaty of Peace between Great Britain and China, signed at Tientsin, on June 26, 1858,[132] the Court ceremony of receiving foreign envoys was agreed upon as follows:

"He (British envoy) shall not be called upon to perform any ceremony derogatory to him as representing the Sovereign of an independent nation, on a footing of equality with that of China. On the other hand, he shall use the same forms of ceremony and respect to His Majesty the Emperor as are employed by the Ambassadors, Ministers, or Diplomatic Agents of Her Majesty towards the Sovereigns of independent and equal European nations." [133]

The first Chinese Imperial Decree regulating audiences accorded to foreign envoys appeared in the *Peking Gazette* of June 14, 1873, and was communicated to the Legations on June 15.[134] The foreign representatives were not satisfied with the etiquette prescribed therein. In the Chefoo Treaty between Great Britain and China, September 13, 1876,[135] the drawing up of a code of Chinese Court Etiquette corresponding to the Western standard was demanded by Great Britain:

"To the prevention of further misunderstanding upon the subject of intercourse and correspondence, the present conditions of both having caused complaint in the Capital and in the provinces, it is agreed that the Tsung-li Yamen shall address a Circular to the Legations, inviting foreign Representatives to consider with them a code of etiquette, to the end that foreign officials in China, whether at the ports or elsewhere, may be treated with the

[131] See *U. S. For. Rel.*, 1871, p. 89; 1873, pp. 132, 135, 136, 143, 148, 149, 151, 152, 158, 159, 162, 167, 172, 174, 176, 179, 189, 190, 194, 195, 209, 266, 267; 1875, p. 228; 1880, p. 463; 1888, pp. 291, 307; 1891, pp. 355, 357, 360, 363, 367, 374, 382, 385, 392, 455, 456; 1892, p. 85.

[132] Hertslet, Vol. 1, No. 6.

[133] Art. III, Par. 2.

[134] *Br. and For. St. Papers*, Vol. 65 (1873-74), p. 658.

[135] Hertslet, Vol. 1, No. 12.

same regard as is shown them when serving abroad in other countries, and as would be shown to Chinese Agents so serving abroad.

"The fact that China is about to establish Missions and Consulates abroad renders an understanding on these points essential." [136]

It was not until the conclusion of the Final Protocol of the Settlement of the Boxer Uprising between China and the Allied Powers, September 7, 1901,[137] that the modification of Court ceremony with respect to the reception of foreign representatives was effectively made to the satisfaction of the Western countries.[138] The fact that China took cognizance of this urgent demand can be shown by the following Memorandum on the ceremonial to be followed in solemn audiences: [139]

"1. Solemn audiences to be given by His Majesty the Emperor of China to the Diplomatic Body or to Representatives of the Powers separately shall take place in the palace hall called 'Ch'ien-ch'ing Kung'.

"2. In going to or coming back from these solemn audiences the Representatives of the Powers shall be carried in their sedan chairs as far as outside of the Ching-yun gate. At the Ching-yun gate they will get out of the sedan chair in which they have come and will be carried in a little chair (i chiao) as far as the foot of the steps of the Ch'ien-ch'ing gate.

"On arriving at the Ch'ien-ch'ing gate the Representatives of the Powers shall get out of their chairs, and shall proceed on foot into the presence of His Majesty in the Ch'ien-ch'ing Kung hall.

"When departing the Representatives of the Powers shall return to their residences in the same manner as that in which they arrived.

"3. When a Representative of a Power shall have occasion to present to His Majesty the Emperor his letters of credence or a communication from the Head of the State by whom he is accredited, the Emperor shall cause to be sent to the residence of said Representative, to bear him to the Palace, a sedan chair with yellow trimmings and tassels, such as are used by the Princes of the Imperial family. The said Representative shall be taken back to his residence in the same manner. An escort of troops shall likewise be sent to the residence of said Representative to accompany him going and returning.

"4. When presenting his letters of credence or communication from the Head of the State by whom he is accredited, the Diplomatic Agent, while bearing said letters or communications, shall pass by the central openings of the Palace doors until he has arrived in the presence of His Majesty. On returning from these audiences he will comply, as regards the doors by which

[136] Sec. II, Art. 1, Pars. 2, 3.

[137] MacMurray, Vol. 1, No. 1901/3; see also Art. 12 of the Joint Note regarding conditions for re-establishment of normal relations between China and the Powers, December 22, 1900 (*Ibid.*, Vol. 1, pp. 309-310).

[138] Art. XII, Par. 2.

[139] See the Reply of the Chinese Plenipotentiaries to the Joint Note of December 22, 1900, on January 16, 1901 (MacMurray, Vol. 1, p. 310).

he may have to pass, with the usages already established at the Court of Peking for audiences given to Foreign Representatives.

"5. The Emperor shall receive directly into his hands the letters and communications above mentioned which the Foreign Representatives may have to hand to him.

"6. If His Majesty should decide upon inviting to a banquet the Representatives of the Powers it is well understood that this banquet shall be given in one of the halls of the Imperial Palace and that His Majesty shall be present in person.

"7. In brief, the ceremonial adopted by China as regards Foreign Representatives shall, in no case, be different from that which results from perfect equality between the Countries concerned and China, and without any loss of prestige on one side or the other." [140]

Since the establishment of the Republic in 1912, China has adapted herself to the general practices of the Western nations in international relations, and hence there has been no more controversy over the reception of foreign envoys.[141] It may be remarked, however, that the ceremony of receiving ambassadors by the Chinese government is slightly more elaborate than in the case of ministers.[142]

VIII. Termination of Diplomatic Mission

China makes no departure from the usual practices respecting the termination of diplomatic missions. The death, transfer or expiration of the term of an envoy puts an end to his mission. According to the Regulations for the Guidance of Chinese Envoys, 1877, the term of the envoys and their subordinates was three years.[143] The Temporary Regulations relating to the Transfer of Diplomatic and Consular Officers, promulgated by the Ministry of Foreign Affairs, on February 25, 1935, provides that the term of diplomatic officers is four years and that the officers sent to the countries of extreme temperatures have only two years of term.[144] At the expiration of

[140] MacMurray, Vol. 1, No. 1901/3, Annex No. 19.

[141] For illustrations of the ceremonials followed in audiences of receiving foreign ministers during the Republican regime, see Nien I-va, *Modern International Law*, pp. 273-274.

[142] See the description of the ceremonial followed in audiences of receiving Mr. Karakhan, Soviet ambassador to China, by the Chinese government, while he presented his credentials to the President, *ibid.*, pp. 275-276.

[143] Arts. 2, 4.

[144] *C.L.C.R.*/2, Vol. 2, p. 1255. According to the Temporary Regulations governing the Appointment of Diplomatic and Consular Officers, 1933, the term of diplomatic officers sent to countries located in temperate zones was three years, while that of those sent to countries located in torrid zones was two years. (Art. 7.)

their term, they may be either allowed to continue in office for another term or transferred to other embassies, legations, or the Ministry of Foreign Affairs.[145] Furthermore, the Ministry of Foreign Affairs has the power to transfer and recall diplomatic officers at any time in accordance with laws and ordinances.[146] Under any of these conditions, his mission is naturally ended.

It is the general rule of international law that an envoy may be recalled by his own government upon the request of the country to which he is accredited. China has acted upon this general rule. In December, 1918, the Chinese government requested the government of the Netherlands in a rather indirect way to recall Mr. Jonkheer Beelaerts, Dutch minister to Peking. The underlying causes and the negotiation of his ultimate recall have been stated as follows in a contemporary publication:

"Three weeks ago the Chinese minister at The Hague approached the Netherlands government with reference to the conduct of the Dutch minister at Peking. He pointed out that Jonkheer Beelaerts, in his zeal to protect German interests, had overstepped the limits of neutral propriety, which had resulted in friction between the Chinese government and the Dutch Legation, a state of affairs which should not exist between two friendly nations. The Netherlands government was quite frank and conciliatory. It admitted that friction between one of its representatives and a friendly government was not conducive to the continuance of friendly relations and undertook to recall Jonkheer Beelaerts and replace him by a representative who would be *persona grata*.

"This promise has apparently been kept. Three days ago the Chinese government was informed by the Netherlands government that the present minister in Peking was being recalled." [147]

Constant turmoil in internal affairs of a State was regarded, at least once, by the Chinese government as a sufficient cause for the suspension of the recognition of the legation and consulates of that State. During the period of the Russian Revolution, the Chinese government issued, under the seal of the President, on September 23, 1920, a mandate, of which a copy was communicated to the Russian minister to Peking, Prince Koudacheff, by the Ministry of Foreign Affairs. The following is an extract from the mandate:

[145] The Temporary Regulations relating to the Transfer of Diplomatic and Consular Officers, 1935, Art. 2.

[146] The Organic Law of Diplomatic Missions and Consulates Abroad, 1930, Art. 17.

[147] *North-China Herald*, 1918, p. 722, under the title: Dutch Minister's Recall, Peking, December 13, 1918.

"The Ministry of Foreign Affairs has reported as follows:

"In the course of the last years many organizations have appeared in Russia which are at war with each other; party strife took place and no United Government, expressing the will of the people, has been constituted until now; it is therefore difficult for the time being to restore regular diplomatic relations between China and Russia. With regard to the diplomatic and consular officers primarily appointed by Russia to China, they have long ago lost their representative character and have indeed no ground to continue discharging the responsible duties devolving upon them. Declarations in this sense have been made personally to the Russian minister in Peking; the Ministry therefore request the immediate promulgation of a mandate, announcing the suspension of the recognition of the Russian minister and consuls in China." [148]

In reply, the Russian minister sent a note to the Minister of Foreign Affairs of the Chinese government on September 24, 1920, informing him that he had wired all the Russian consulates in China of the promulgation of the Chinese mandate for the information of the Russian citizens sojourning within their consular districts. Following this note, he notified the Dean of the Diplomatic Corps in Peking of the termination of his mission in China and instructed his subordinates to wind up their business.[149]

The recall of diplomatic representatives serves as both the cause and result of the severance of diplomatic relations and also of the declaration of War. Sino-Soviet relations were broken off in April-May, 1927, when the Soviet envoy in Peking was recalled by his government in protest against the raid upon the Soviet Embassy by Chang Tso-lin. The raid resulted in the discovery of many documents which showed that the Soviet diplomatic and consular agents were instigating disorders in China.[150] During the World War, the Chinese government protested against the German policy of using submarines to sink neutral and belligerent merchantmen, on February 9, 1917. Considering its protest to be ineffectual, the Chinese government notified Germany, on March 14, of the severance of diplomatic relations between the two countries.[151] At the

[148] *China Year Book*, 1921-22, p. 626.

[149] *Ibid.*, pp. 626-627.

[150] Diplomatic relations between the two countries has been resumed on December 13, 1932. See *ibid.*, 1933, pp. 655-656.

[151] See the Presidential Mandate and Proclamation announcing Severance of Diplomatic Relations with Germany, March 14, 1917 (MacMurray, Vol. 2, p. 1369). Since the severance of diplomatic relations between the two countries, the minister of the Netherlands took charge of the protection of the German interests in China. See also *ibid.*, Vol. 2, pp. 1363-64.

same time, the ministers were recalled. The action thus taken was communicated to the American minister by the Chinese government on the same date by a note, from which the following is an excerpt:

". . . . The Chinese government is therefore constrained to take further action. It is addressing a note to the German Minister, severing the diplomatic relations at present existing with Germany, and is also issuing passports for leaving the country to the said Minister, the members of the Legation, and their families, as well as to the German Consuls at the different ports of China. At the same time this note is also addressed to you with the request that you inform your Government." [152]

The recall of ministers as a result of the declaration of war can be evidenced by the note sent by the Ministry of Foreign Affairs of the Chinese government to the Austro-Hungarian Minister in Peking, on August 14, 1917. It reads in part:

"Besides telegraphing the Chinese Minister at Vienna to inform the Austro-Hungarian Government and to apply for his passport, I have the honor to send you herewith passports for your Excellency, the members of the Austro-Hungarian Legation and their families and retinue for protection while leaving Chinese territory. With regard to Consular Officers of Austria-Hungary in China, this Ministry has instructed the different Commissioners of Foreign Affairs to issue them likewise passports for leaving the country."[153]

Due to the present undeclared war in China, the Japanese ambassador to China, Mr. Kawagoe, and the Chinese ambassador to Japan, Mr. Hsu Shih-ying, were recalled during the early part of the year of 1938.[154]

IX. Rights, Privileges, Exemptions, and Immunities of Diplomatic Officers

Right of Residence at the Capital

Because of the misconception of and lack of desire for international relations during the later part of the Ch'ing dynasty, the right of residence of foreign representatives at the Chinese Capital was reluctantly accepted by the Manchu Court. When the Treaty of Peace, Friendship, and Commerce between Great Britain and

[152] MacMurray, Vol. 2, p. 1370.
[153] *Ibid.*, Vol. 2, p. 1364.
[154] *China Year Book*, 1938, p. viii.

China was signed at Tientsin on June 26, 1858,[155] this right was provided therein upon the demand of Great Britain:

"His Majesty the Emperor of China hereby agrees, that the Ambassador, Minister, or other Diplomatic Agent, so appointed by Her Majesty the Queen of Great Britain, may reside, with his family and establishment, permanently at the capital, or may visit it occasionally, at the option of the British Government." [156]

It was further agreed by the Tientsin Treaty that the British Government might acquire at Peking a site for building, or hire houses for the accommodation of its mission, and that the Chinese government should assist it in so doing.[157] However, "in the course of subsequent conversations in Shanghai," as Knight Biggerstaff observes, "the Chinese negotiators, under pressure from the Throne, begged the British not to insist upon the establishment of their legation in Peking." [158] The British conditionally consented to have their minister reside elsewhere and to visit the capital only when occasion demanded his presence. But this promise was finally cancelled as a result of new hostilities in 1860. Article II of the Convention of Peace and Friendship between Great Britain and China, signed at Peking, October 24, 1860,[159] reads:

"It is further expressly declared, that the arrangement entered into at Shanghai in the month of October, 1858, between Her Britannic Majesty's Ambassador, the Earl of Elgin and Kincardine, and His Imperial Majesty's Commissioners, Kweiliang and Hwashana, regarding the residence of Her Britannic Majesty's Representative in China, is hereby cancelled; and that, in accordance with Article III of the Treaty of 1858, Her Britannic Majesty's Representative will henceforward reside permanently or occasionally at Peking, as Her Majesty shall be pleased to decide." [160]

Knight Biggerstaff remarks that by the summer of 1860 the Russian minister had already taken up his residence in Peking, the English and French legations were established there in 1861, and the American minister arrived in 1862.[161] Separate treaties have been concluded between China and the Powers regarding the right

[155] Hertslet, Vol. 1, No. 6.
[156] Art. III, Par. 1.
[157] See Art. III, Par. 3.
[158] Knight Biggerstaff, "The Establishment of Permanent Chinese Diplomatic Missions Abroad," *op. cit.*, p. 2.
[159] Hertslet, Vol. 1, No. 8.
[160] Hertslet, Vol. 1, p. 49.
[161] Knight Biggerstaff, "The Establishment of Permanent Chinese Diplomatic Missions Abroad," *op. cit.*, p. 3.

of foreign representatives to reside at the Chinese capital, with about the same provision as contained in the Treaty of 1858 between Great Britain and China.[162] In more recent years the Chinese Government has considered this right as a matter of course, and no question has been raised about it.

The Right of Inviolability

The principle of inviolability of diplomatic missions has been recognized by the Chinese government since the very beginning of its intercourse with foreign nations. The Treaty of Peace, Friendship, and Commerce between Great Britain and China, June 26, 1858, provides:

"Any person guilty of disrespect or violence to Her Majesty's Representative, or to any member of his family or establishment, in deed or word, shall be severely punished."[163]

In the Treaty of Commerce and Navigation between China and Japan, signed at Peking, July 21, 1896,[164] the right of inviolability of diplomatic representatives was provided more fully:

"Their persons, families, suites, establishments, residences, and correspondence shall be held inviolable."[165]

According to the Criminal Code, promulgated by the National Government, on January 1, 1935,[166] any person, who has purposely

[162] See Arts. V and VI of the Treaty of Peace, Friendship, and Commerce between China and the United States, signed at Tientsin, June 18, 1858 (Hertslet, Vol. 1, No. 94); Art. II of the Treaty of Commerce, etc., between Russia and China, signed at Tientsin, June 1/13, 1858 (*Ibid.*, No. 81); Art. II of the Treaty of Friendship, Commerce, and Navigation between China and France, signed at Tientsin, June 27, 1858 (*Ibid.*, No. 40); Arts. II and III of the Treaty of Friendship, Commerce, and Navigation between Prussia and China, signed at Tientsin, September 2, 1861 (*Ibid.*, No. 56); Art. III of the Treaty of Friendship, Commerce, and Navigation between Denmark and China, signed at Tientsin, July 13, 1863 (*Ibid.*, No. 38); Art. I of the Treaty of Friendship and Commerce between China and the Netherlands, signed at Tientsin, October 6, 1863 (*Ibid.*, No. 70); Art. III of the Treaty of Friendship, Commerce, and Navigation between Italy and China, signed at Peking, October 26, 1866 (*Ibid.*, No. 60); Art. II of the Treaty of Friendship, Commerce, and Navigation between China and Peru, signed at Tientsin, June 26, 1874 (Hertslet, Vol. 1, No. 71).

[163] Art. III, Par. 5. The same provision is contained in the Treaty of Friendship, Commerce, and Navigation between Denmark and China, 1863, Art. III, Par. 3.

[164] Hertslet, Vol. 1, No. 64.

[165] Art. II, Par. 3. See also Art. II, Par. 2 of the Treaty of Amity, Commerce, and Navigation between China and Spain, signed at Tientsin, October 10, 1864 (*Ibid.*, No. 91). The raid upon the Soviet embassy by the Peking government, on April 6, 1927, was a violation of international law, although the action was taken under necessity because of the constant propaganda and instigation of Chinese Revolution by the Soviet embassy. See *Chinese Soc. and Pol. Sci. Rev.*, Vol. 12 (1938), p. 151.

[166] *C.L.C.R./2*, Vol. 1, pp. 137-155.

done injury to the body, liberty or reputation of the Head or the diplomatic representative of a foreign State, shall be severely punished.[167]

Freedom of Movement

Freedom of movement of diplomatic officers is essential to the exercise of diplomatic functions. China has fully recognized this principle. In the Treaty of Peace, Friendship, and Commerce between Great Britain and China, 1858, it was provided that no obstacle or difficulty should be made to the freedom of movement of the British representative, and that he and the persons of his suite might come, go, and travel at their pleasure.[168] The reciprocal recognition of this right was more explicitly provided in the Treaty of Amity and Commerce between Corea and China, signed at Seoul, September 11, 1899.[169]

"No restrictions or difficulties shall be imposed upon the movements of the members of the official establishments of either country, or upon messengers carrying official despatches." [170]

Furthermore, special privileges of transit on Chinese national railways have been accorded by the Chinese government to foreign diplomatic representatives.[171]

Freedom to Employ Subordinates

The freedom of foreign representatives to employ subordinates was also provided for in the treaties concluded between China and the other countries. The Treaty of Peace, Friendship, and Commerce between Great Britain and China, 1858, provides that the British representative should have liberty to choose his own servants and attendants, who should not be subjected to any kind of molestation whatever.[172] This provision was contained in other treaties without any substantial changes.[173] Article II of the Treaty of

[167] Art. 116.
[168] Art. IV.
[169] Hertslet, Vol. 1, No. 37.
[170] Art. II, Par. 4.
[171] See the Regulations relating to the Privileges of Transit on National Railways, Accorded to Foreign Diplomatic Officers, promulgated by the Ministry of Foreign Affairs, on July 25, 1935 (*C.L.C.R./2*, Vol. 8, p. 5086).
[172] Art. III, Par. 4.
[173] See Art. III of the Treaty of Friendship, Commerce, and Navigation between Prussia and China, 1861; Art. III of the Treaty of Friendship, Commerce, and Navigation between Denmark and China, 1863; Art. II of the Treaty of Amity, Commerce, and Navigation between China and Spain, 1864.

Commerce and Navigation between China and Japan, 1896, reads in part:

"They shall be at liberty to select and appoint their own officers, couriers, interpreters, servants, and attendants, without any kind of molestation." [174]

Liberty of Correspondence and Privileges of Diplomatic Couriers

In the Treaty of Peace, Friendship, and Commerce between Great Britain and China, 1858, the liberty of correspondence of diplomatic representatives and the privileges accorded to couriers were fully confirmed. Article IV of the Treaty reads in part:

"He (British representative) shall, moreover, have full liberty to send and receive his correspondence to and from any point on the sea-coast that he may select; and his letters and effects shall be held sacred and inviolable. He may employ, for their transmission, special couriers, who shall meet with the same protection and facilities for travelling as the persons employed in carrying despatches for the Imperial Government; and, generally, he shall enjoy the same privileges as are accorded to officers of the same rank by the usage and consent of Western nations."

Similar privileges have been accorded by the Chinese government to other countries.[175] But only *bona fide* diplomatic couriers are entitled to full protection.[176]

Exemption from Income Tax and Customs Duties

According to the regulations relating to the Enforcement of the Temporary Rules governing Income Tax, promulgated by the Executive *Yuan* on August 22, 1936,[177] no income tax is applied to foreign diplomatic officers. Article 2 of the Regulations reads:

"The foreign diplomatic officers accredited to China are exempted from income tax."

As to the procedure for the exemption from duty of articles for the use of diplomatic and consular officers in China, the Chinese government laid down the following regulations:

[174] Hertslet, Vol. I, p. 374.

[175] See Art. IV of the Treaty of Friendship, Commerce, and Navigation between Denmark and China, 1863; Arts. II and III of the Treaty of Amity, Commerce, and Navigation between China and Spain, 1864; Art. IV of the Treaty of Friendship, Commerce, and Navigation between Italy and China, 1866; Art. II of the Treaty of Commerce and Navigation between China and Japan, 1896; Art. II of the Treaty of Amity and Commerce between China and Corea, 1899.

[176] See the Statement issued by the Ankuochun Headquarters of the Peking government, on March 17, 1927, regarding the Seizure of the Soviet Steamship *Pamiot Lenina* on February 28. (*China Year Book*, 1928, pp. 791-792).

[177] *C.L.C.R./2*, Vol. 10, pp. 450-452.

"I. Standard of exemption of duty;

"A. Articles for the official or personal use of foreign diplomatic envoys in China, such as ambassadors, ministers, and chargés d'affaires, and articles for the personal use of the members of their immediate families shall be granted remission of duty.

"B. All articles for their personal use carried when first arriving in China or when returning home by members of the staff of a foreign diplomatic mission in China, such as secretaries, attachés, and naval and military attachés, shall all be granted remission of duty.

"C. All articles for the official use of, and articles for their personal use carried when first arriving in China or when returning home by foreign consuls general, consuls, and trade commissioners of rank equal to that of consul shall also be granted remission of duty.

"D. If any country has enacted regulations restricting the remission of duty or freedom of entry of articles for official or personal use, carried by Chinese ambassadors, ministers, chargés d'affaires, officers of Chinese diplomatic missions, consuls, and trade commissioners abroad which differ from these, the official and personal effects of such country's diplomatic, consular, and other officers in China shall be treated in accordance with the regulations of that country.

"II. Procedure for remission of duty:

"A. The above-listed diplomatic and other officers on whose official and personal effects duty should be remitted, should have their names, official status, and the kinds and quantities of the effects, together with the port of entry or exportation, transmitted in a detailed list through the Ministry of Foreign Affairs to the Ministry of Finance for consideration and for the issuance of instructions for the Maritime Customs' guidance.

"B. If, before the Maritime Customs shall have received instructions from the Ministry of Finance, the official or personal effects of any of the above-listed diplomatic or other officers reach the customs, accompanied with a request for the remission of duty, it shall be permissible, after having inspected the letter of credence or other official documents for the customs first, in accordance with the above regulations to remit the duty and release the articles, but the matter shall always be reported to the Ministry of Finance for consideration and approval.

"C. Every customs shall, each time the official or personal effects of a diplomatic officer as listed above have been released, make a record in detail of the name, official status, kinds and quantities of articles, amount of duty remitted, the ship on which carried, and the date of arrival, to be periodically incorporated in a list and submitted to the Ministry of Finance for examination." [178]

[178] A. H. Feller and M. O. Hudson, *op. cit.*, Vol. 1, pp. 284-285. The English text was enclosed in Despatch No. 203, of May 12, 1930, from the American Legation at Peiping to the Secretary of State.

Immunities from local Jurisdiction

It is a general rule of international law that diplomatic representatives possess immunity from the civil and criminal jurisdiction of the countries of their sojourn, and cannot be sued, arrested, or punished under the laws of those countries. China has followed this rule closely from the inception of relations with modern States. Due to the existence of the extraterritorial system in China,[179] any exercise of jurisdiction over foreign diplomatic officers is out of the question.

Other Rights, Privileges, and Immunities

Besides those mentioned above, foreign representatives in China possess other rights, privileges and immunities according to the rules of international law, international usage and practices, and most-favored-nation treatment. In the Treaty of Friendship, Commerce, and Navigation between Denmark and China, 1863, it was provided that the Danish representative should enjoy all the privileges and immunities which belong to his office under the law of nations.[180] The Treaty of Commerce and Navigation between China and Japan, 1896, provides:

> "The Diplomatic Agents thus accredited shall respectively enjoy all the prerogatives, privileges, and immunities accorded by international law to such Agents, and they shall also in all respects be entitled to the treatment extended to similar Agents of the most-favored-nation." [181]

The clause that the diplomatic agents are entitled to all the privileges, prerogatives and immunities accorded by international law is also included in many other treaties concluded between China and other countries.[182] On July 9, 1928, the National Government promulgated the Temporary Regulations governing the International Relations of China with Foreign Countries, When The

[179] *Supra*, pp. 70-74; *infra*, pp. 151-152.
[180] Art. III.
[181] Art. II.
[182] See Art. II of the Treaty of Amity, Commerce, and Navigation between China and Spain, 1864; Art. VI of the Treaty of Friendship and Commerce between Portugal and China, signed at Peking, December 1, 1887 (Hertslet, Vol. 1, No. 73); Art. II of the Treaty of Commerce between Austria and China, signed at Vienna, October 19, 1925 (*Supplement to MacMurray's Treaties*, pp. 165-169); Art. II of the Treaty of Friendship between China and Turkey, signed at Ankara, April 4, 1934 (*League of Nations Treaty Series*, Vol. 153 (1934), pp. 163-165).

Old Treaties Have Been Terminated and the New Treaties Have Not Yet Been Concluded.[183] Article II of the Regulations reads:

"The diplomatic and consular officers of foreign States shall be treated according to the rules of international law."

With respect to the rights, privileges and immunities accorded by international usage and practice, the Treaty of Friendship, Commerce, and Navigation between China and Peru, 1874, provides:

"The Diplomatic Agent of each of the Contracting Parties shall, at their respective residences, enjoy all privileges and immunities accorded to them by international usage." [184]

Immediately after the unilateral denunciation of the Sino-Belgian Treaty of 1865, Dr. Wellington Koo, Minister of Foreign Affairs, on November 6, 1926, sent a note to M. le Maire de Warzee d'Hermalle, Belgian Minister to Peking, declaring:

"It will be noted, however, that in the meantime the local authorities are ordered to extend full and due protection to the Belgian Legation, Consulates, nationals, products and ships in China in accordance with the rules of international law and usage, and the Ministries concerned are ordered to propose, in conformity with international practice, arrangements for their favorable treatment and submit these for consideration, approval and enforcement." [185]

The Statement of the Chinese government, on November 10, 1927, explaining the termination of the Sino-Spanish Treaty of October 10, 1864, contains almost the same provision as that in Dr. Koo's Note just mentioned.[186]

Most-favored-nation treatment was also stipulated in many treaties concluded between China and the other Powers.[187] Article II of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, signed at Washington, December 14, 1899,[188] reads in part:

"The Diplomatic Agents of each of the High Contracting Parties may reside permanently or temporarily in the capital of the other, with their families and members of their suite, and enjoy, in the countries of their respective

183 *C.L.C.R.*/2, Vol. 2, p. 1280.

184 Art. III. See also Art. I of the Treaty between China and the United States respecting Commercial Relations, etc., signed at Shanghai, October 8, 1903 (Hertslet, Vol. 1, No. 100).

185 *China Year Book*, 1928, p. 781.

186 *Ibid.*, pp. 1402-1403.

187 See Art. II of the Treaty of Commerce and Navigation between China and Japan, 1896; Art. I of the Treaty between China and the United States respecting Commercial Relations, etc., 1903; Art. II of the Treaty of Amity between Chile and China, February 18, 1915 (MacMurray, Vol. 2, No. 1915/2).

188 Hertslet, Vol. 1, No. 69.

residence, the same prerogatives, exemptions, immunities, and privileges granted to the Agents of the same rank of the most-favored-nation."

X. Functions and Restrictions of Diplomatic Missions

Functions of Diplomatic Missions

The functions of a diplomatic representative are manifold. The Organic Law of Diplomatic Missions and Consulates Abroad, 1930, provides:

"Ambassadors plenipotentiary, ministers plenipotentiary, and chargés d'affaires shall comply with the instructions of the Ministry of Foreign Affairs performing diplomatic functions between China and the nations to which they are accredited and in supervising members of the staff and consuls under their jurisdiction." [189]

In practice, the most important functions of a Chinese diplomatic representative are the promotion of good relations between China and the country to which he is accredited, representation in behalf of China as a whole, negotiation of treaties, protection of his countrymen in that country, and supervision of his subordinates in performing various functions. Besides, he has many other miscellaneous duties, such as the presentation of decorations in behalf of the Chinese government to the Head of the country of his sojourn,[190] investigation of evidence abroad for the Chinese courts,[191] registration of Chinese abroad in places where there are no Chinese consulates,[192] and taking charge of matters concerning passports.[193]

Restrictions Imposed Upon Diplomatic Officers

In numerous ways the Chinese government has laid down rules to restrict the conduct of its diplomatic officers. The following are the comparatively important ones:

189 Art. 5.

190 See Art. 10 of the Rules relating to the Bestowing of Decorations by the National Government, promulgated by the National Government, on December 2, 1933 (*C.L.C.R./2*, Vol. 1, p. 375).

191 Art. 295 of the Regulations relating to Civil Procedure, promulgated by the National Government, on February 1, 1935 (*C.L.C.R./2*, Vol. 1, pp. 175-205).

192 Art. 2 of the Rules relating to the Registration of Chinese Abroad, enacted by the 33rd Session of the Standing Committee of the Central Executive Committee of the Nationalist Party, on September 5, 1929 (*Ibid.*, Vol. 2, p. 1286); Administrative Rules relating to the Registration of Chinese Abroad, promulgated by the Ministry of Foreign Affairs, on January 17, 1930 (*Ibid.*, Vol. 2, p. 1286).

193 Arts, 6, 12, 15, Rules governing the Issuance of Chinese Passports, promulgated by the National Government on January 31, 1931 (*Ibid.*, Vol. 2, pp. 1269-1270); Art. 2, Rules governing the Examination of the Passports of Alien Immigrants, promulgated by the Executive *Yuan*, on August 22, 1930 (*Ibid.*, Vol. 2, p. 1270).

(1) A diplomatic officer cannot ask for transfer before the expiration of his term.[194]

(2) After appointment he should go to his post promptly and any unnecessary delay is not allowed.[195]

(3) During the period of national emergency, he cannot ask leave for going back to China, except under the following conditions:[196] (*a*) serious sickness, (*b*) important consultation with the government, (*c*) marriage if being in service in that country for more than three years, and (*d*) the death of his parents or wife.[197] If he leaves his post without permission or does not resume it after the expiration of the period of his permitted leave, he should be punished in accordance with law.[198]

(4) According to the Rules prohibiting the Persons in the Military and Diplomatic Services to marry Foreign Wives, promulgated by the National Government in November, 1934,[199] a diplomatic officer is not allowed to marry a foreign wife. If the marriage took place before the promulgation of the Rules, however, he may continue in diplomatic service. In this case, the government is to avoid appointing him to the country of which his wife was or still is a national.[200]

194 Art. 2, Temporary Regulations relating to the Transfer of Diplomatic and Consular Officers, 1935.

195 Art. 5, Regulations governing the Process of Assuming Office of the Diplomatic and Consular Officers after Appointment, promulgated by the Ministry of Foreign Affairs, on August 27, 1929, and revised on November 29, 1930 (*C.L.C.R./2*, Vol. 2, p. 1261).

196 Art. 1, Temporary Regulations governing the Asking of Leave of the Diplomatic and Consular Officers for Return to China, promulgated by the Ministry of Foreign Affairs, on June 1, 1933, and finally revised on March 16, 1934 (*Ibid.*, Vol. 2, p. 1262).

197 Or the death of husband, in case of the diplomatic officer being a woman.

198 Art. 5, Temporary Regulations governing the Asking of Leave of the Diplomatic and Consular Officers for Return to China, 1934.

199 *C.L.C.R./2*, Vol. 3, p. 1698.

200 The Rules fail to prohibit the marriage of a Chinese diplomatic officer with a foreign husband. Due to the increase of women in diplomatic service, it is advisable to make the Rules more precise in this point.

CHAPTER VI

CONSULAR SERVICE

I. Conventional Provisions Concerning Consular Relations between China and Other Countries

Establishment of Foreign Consulates in China

ALTHOUGH trade relations between China and the Modern Western States began as early as the middle of the sixteenth century,[1] no formal recognition was given by the Chinese government to the establishment of foreign consulates at the Chinese ports to protect the interests of their nationals residing there until the nineteenth century. By the Treaty of Peace between Great Britain and China, signed at Nanking on August 29, 1842,[2] the right of the British government to appoint consuls at the Chinese ports was established. Article II of the Treaty reads:

"His Majesty the Emperor of China agrees, that British subjects, with their families and establishments, shall be allowed to reside, for the purpose of carrying on their mercantile pursuits, without molestation or restraint, at the cities and towns of Canton, Amoy, Foochowfoo, Ningpo, and Shanghai.

"And Her Majesty the Queen of Great Britain, &c., will appoint Superintendents, or Consular Officers, to reside at each of the above named cities or towns, to be the medium of communication between the Chinese authorities and the said merchants, and to see that the just duties and other dues of the Chinese government, as hereafter provided for, are duly discharged by Her Britannic Majesty's subjects."

Two years later, China concluded with France and the United States treaties which contained almost the same provisions as those in the Sino-British Treaty of 1842.[3] The Treaty of Peace, Friend-

[1] See H. B. Morse, *The International Relations of the Chinese Empire*, Vol. I, p. 41.

[2] Hertslet, Vol. I, No. 1.

[3] See Art. XXIII of the Treaty of Friendship, Commerce, and Navigation between China and France, signed at Whampoa, October 24, 1844 (Hertslet, Vol. I, No. 39); Treaty between the United States and China, signed at Wang-hia, July 3, 1844 (*Ibid.*, Vol. I, No. 93). For the establishment of the Russian consulates in China, see Art. II of the Treaty of Commerce between Russia and China, signed at Kouldja, July 25, 1851 (*Ibid.*, Vol. I, No. 79), Art. V of the Treaty of Commerce, &c., between Russia and China, signed at Tientsin, June 1/13, 1858 (*Ibid.*, Vol. I, No. 81).

ship, and Commerce between Great Britain and China of June 26, 1858, further provides:

"Her Majesty the Queen may appoint one or more Consuls in the dominions of the Emperor of China, and such Consul or Consuls shall be at liberty to reside in any of the open ports or cities of China as Her Majesty the Queen may consider most expedient for the interests of British commerce They shall be treated with due respect by the Chinese authorities, and enjoy the same privileges and immunities as the Consular officers of the most favored nation

"Consuls and Vice-Consuls in charge shall rank with Intendents of Circuits, Vice-Consuls, Acting Vice Consuls, and Interpreters, with Prefects They shall have access to the official residences of these officers, and communicate with them, either personally or in writing, on a footing of equality, as the interests of the public service may require"[4]

In the following years, treaties were concluded between China and many other countries, and their right to appoint consuls residing at the Chinese ports was firmly established.[5]

Movement for Sending Chinese Consuls Abroad

Among the accomplishments of the Burlingame Mission was the negotiation and conclusion of the Additional Articles to the Treaty of Commerce between the United States and China of June 18,

[4] Art VII

[5] See, for example Art X of the Treaty of Peace, Friendship, and Commerce between China and the United States, signed at Tientsin, June 18,' 1858 (Hertslet, Vol I, No 94), Art IV of the Treaty of Friendship Commerce, and Navigation between the German Customs Union and China, signed at Tientsin, September 2, 1861 (*Ibid* Vol I, No 56) Art VII of the Treaty of Friendship, Commerce, and Navigation between Denmark and China, signed at Tientsin, July 13, 1863 (*Ibid*, Vol I, No 38), Art I of the Treaty of Friendship and Commerce between China and the Netherlands, signed at Tientsin, October 6, 1863 (*Ibid*, Vol I, No 70), Art IV of the Treaty of Amity, Commerce, and Navigation between China and Spain, signed at Tientsin, October 10, 1864 (*Ibid*, Vol I, No 91), Art IV of the Treaty of Friendship, Commerce, and Navigation between China and Peru, signed at Tientsin, June 26, 1874 (*Ibid*, Vol I, No 71), Art IX of the Treaty of Friendship and Commerce between Portugal and China, signed at Peking, December 1, 1887 (*Ibid*, Vol I, No 73), Art III of the Treaty of Commerce and Navigation between China and Japan, signed at Peking July 21, 1896 (*Ibid*, Vol I, No 64), Art XIII of the Agreement between Great Britain and China, modifying the Convention of March 1, 1894, relative to Burmah and Tibet, signed at Peking, February 4, 1897 (MacMurray, Vol. I, No 1897/1); Art III of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, signed at Washington, December 14, 1899 (Hertslet, Vol I, No 69); Art II of the Treaty between China and the United States, respecting Commercial Relations, &c, signed at Shanghai, October 8, 1903 (*Ibid*, Vol. I, No 100), Art. III of the Treaty of Friendship, Commerce, and Navigation beetween Sweden and China, signed at Peking, July 2, 1908 (MacMurray, Vol I, No 1908/11), Art III of the Treaty of Friendship between China and Turkey, signed at Ankara, April 4, 1934 (*League of Nations Treaty Series*, Vol 153 (1934), pp 163-165)

1858.[6] These Articles were signed at Washington on July 28, 1868.[7] Article III provides the right of the Chinese government to appoint consuls in the United States.

"The Emperor of China shall have the right to appoint Consuls at ports of the United States, who shall enjoy the same privileges and immunities as those which are enjoyed by public law and Treaty in the United States by the Consuls of Great Britain and Russia, or either of them."

The underlying cause of the conclusion of these Articles by the Chinese government was said to be due to the recommendation of Chih Kang and Sun Chia-ku that it would be advisable to have some Chinese officials to protect the interests of thousands of the Chinese merchants and laborers living in California.[8] The same kind of provision was later included in the Supplementary Convention to the Treaty of Commerce and Navigation of 26th June, 1858, between Great Britain and China, signed at Peking, October 23, 1869.[9] Article II of the Supplementary Convention reads:

"China having agreed that England may appoint Consuls to reside at every port open to trade, it is further agreed that China may appoint Consuls to reside at all ports in the British dominions.

"The Consuls so appointed shall respectively be entitled to the treatment accorded to the most favored nation."

Although this Convention was not ratified, it is nevertheless significant of the increasing interest of the Chinese government in sending consuls abroad, and this tendency led to the eventual inauguration of a new policy.

The Chinese attitude toward sending consuls to foreign countries can be further shown by the exchanges of views between Wên Hsiang and W. H. Seward at Peking in 1870.[10] In the memorial presented to the Throne on March 9, 1871, Tsêng Kuo-fan strongly advocated the appointment of consuls to Japan to look after the interests of the Chinese merchants there.[11] The exchange of consuls was formally provided in the Treaty between China and Japan, September 13, 1871. The Chinese government perhaps felt the increasing necessity of sending consuls abroad for the protection of

[6] *Supra*, pp. 111-112.

[7] Hertslet, Vol. I, No. 96.

[8] See I Hou, *Ch'u Shih T'ai Hsi Chi* (Chih Kang's diary), in Wang Hsi-ch'i, *Hsiao Fang Hu Chai Yü Ti Ts'ung Ch'ao*, Bk. XI, 110b.

[9] Hertslet, Vol. I, No. 11.

[10] *Supra*, p. 112.

[11] *Ch'ou Pan Yi Wu Shih Mo* (hereafter cited as *Chinese For. Rel., 1836-1874*), LXXX, 11a-11b.

Chinese overseas, especially after the investigation of the conditions of the Chinese laborers in Peru and Cuba in 1873.[12] In the memorials presented to the Throne by Li Hung-chang, Wang K'ai-t'ai, and Li Tsung-hsi in 1874, the sending of consuls abroad was strongly urged.[13] The reasons for their doing so can be partially explained by the following extract from the memorial presented by Li Tsung-hsi, who pointed out:

". . . that a large number of Chinese live in foreign countries and that they have organized clubs and elected 'head men', called Presidents, whose names are generally well known. Should the custom of Western countries be followed and consuls be sent, men of ability should be chosen irrespective of whether or not they have official rank. Honorary rank should be granted to those competent to act in this capacity and they should be sent to various foreign ports to make friends with the Presidents of the Chinese clubs and to persuade them to act together." [14]

Since that time the Chinese government has realized the usefulness of a consular service, and today the Chinese consuls have been sent to various ports and cities of the world to look after the interests of the State and its nationals.

II. Classification and Personnel of Consulates

Classification of Consulates

According to the Organic Law of Diplomatic Missions and Consulates Abroad, 1930,[15] the Chinese consulates are classified into three kinds: (1) consulate general, (2) consulate, and (3) consulate in charge of vice consul.[16] In places where no consulates have been established, trade commissioners may be appointed.[17] Honorary consuls or honorary vice consuls may be assigned where there have not been appointed consuls nor trade commissioners.[18] The Ministry of Foreign Affairs may assign a deputy consul general, consul, or vice consul to perform the function of the appropriate

[12] *Supra*, p. 112.

[13] *Chinese For. Rel., 1836-1874*, XCIX, 32a-34b, 48b-50a; C, 9b-10b.

[14] Knight Biggerstaff, "The Establishment of Permanent Chinese Diplomatic Missions Abroad," *Chinese Soc. and Pol. Sci. Rev.*, Vol. 20 (1936), No. 1, p. 24.

[15] *The Collected Laws of the Chinese Republic*, Commercial Press, 1936 (hereafter cited as *C.L.C.R.*/2), Vol. 2, pp. 1251-1252.

[16] Art. 3.

[17] Art. 14.

[18] Art. 15. For details of the office of honorary consuls, see Temporary Regulations governing the Functions of the Honorary Consuls, promulgated by the Ministry of Foreign Affairs, on September 26, 1931 (*C.L.C.R.*/2, Vol. 2, p. 1253).

consulate if the responsible consular officer has not yet arrived at his post or has temporarily left his post or has for certain reasons not yet been appointed.[19]

Personnel of Consulates

The personnel of the Chinese consulates are as follows: (1) consulate general: one consul general, one or two vice consuls, one or two student consuls, and one or two chancellors; (2) consulate: one consul, one or two student consuls, and one or two chancellors; and (3) consulate in charge of vice consul: one vice consul, and one or two student consuls. However, one consul may be added to a consulate general and one vice consul may be assigned to a consulate in case of necessity.[20] The functions of these subordinate officers may be summarized in the following manner:

(1) Consuls and vice consuls of a consulate general—complying with the orders of the consul general in assisting in the performance of various consular functions and handling correspondence and investigations;

(2) Vice consuls of a consulate—complying with the orders of the consul in assisting in the performance of various consular functions and handling correspondence and investigations;

(3) Student consuls—complying with the orders of their superiors in handling correspondence and investigations;

(4) Chancellors of a consulate general or a consulate—complying with the orders of their superiors in handling files, recording, writing, and miscellaneous affairs.[21]

Besides these regular officers, the consulates may also employ non-commissioned officers and translators.[22]

III. Appointment, Admittance, and Termination of Office

Appointment

While nominally the consuls are appointed by the Head of the State, the real power of appointment and dismissal of consular officers is vested in the Ministry of Foreign Affairs in accordance

[19] Art. 13, Organic Law of Diplomatic Missions and Consulates Abroad, 1930.
[20] Art. 4.
[21] Arts. 11, 12, 16.
[22] Art. 21.

with laws and regulations.[23] The Committee for Examining the Qualifications of Diplomatic and Consular Officers, instituted by the Ministry of Foreign Affairs in 1936, is empowered to examine the qualifications of applicants for consular offices.[24] Only persons who have been considered by the Committee as well qualified or who have passed the examinations for diplomatic and consular services, can be appointed consular officers.[25] By treaty provisions, the Chinese government is restrained from appointing merchants to act as consuls-general, consuls, vice-consuls or consular agents. The only exception to this rule is in the case of honorary consuls.[26] Furthermore, at least half a year of service in the Ministry of Foreign Affairs is required of every person before being appointed as consular officer.[27] For the purpose of training the subordinate officers of the consulates, special classes are sponsored by the Ministry of Foreign Affairs in political science, economics, international law, consular service, etc.[28] Persons who have passed examinations or are in possession of equivalent knowledge may be assigned by the Ministry of Foreign Affairs to the consulates as students for practical training.[29]

Admittance

The general international practice is that a State cannot refuse to accept a consul of one State for a certain district if it admits a consul of another State to such a district, but a State can refuse to admit the consuls of all countries for certain districts. Following this principle, China rejected the Japanese demand to establish a consulate in Chengtu, capital of Szechuan province, in 1937.[30] Like

[23] Art. 17, Organic Law of Diplomatic Missions and Consulates Abroad, 1930.

[24] Art. 2, Rules governing the Organization of the Committee for Examining the Qualifications of Diplomatic and Consular Officers, promulgated by the Ministry of Foreign Affairs, April 10, 1936 (*C.L.C.R./2*, Vol. 10, p. 179).

[25] Art. 2, Temporary Regulations governing the Appointment of Diplomatic and Consular Officers, promulgated by the Ministry of Foreign Affairs, August 10, 1933 (*C.L.C.R./2*, Vol. 2, pp. 1252-1253). For examinations, see Regulations relating to the Higher Examination of Diplomatic and Consular Officers, promulgated by the Examining *Yuan*, August 5, 1935 (*Ibid.*, Vol. 9, pp. 5669-5670); Regulations relating to the Ordinary Examination of Diplomatic and Consular Officers, promulgated by the Examining *Yuan*, September 3, 1935 (*Ibid.*, Vol. 9, p. 5677).

[26] For details, see *infra*, p. 156, n. 77.

[27] Art. 8, Temporary Regulations governing the Appointment of Diplomatic and Consular Officers, 1933.

[28] Art. 6, Regulations relating to the Training Classes for Diplomatic and Consular Officers, promulgated by the Ministry of Foreign Affairs, on July 24, 1930 (*C.L.C.R./2*, Vol. 2, p. 1253).

[29] Art. 20, Organic Law of Diplomatic Missions and Consulates Abroad, 1930.

[30] Japan finally dropped the demand because of Chinese popular indignation.

other countries, the Chinese government, in appointing a consul, issues a certificate of appointment (or *lettre de provision*) as an evidence of his official position.[31] Whereas a State may refuse a consul sent by another State for personal reasons, admittance of a foreign consul takes place through the grant of a so-called *exequatur*. The Chinese government fully complies with this general rule. A consul sent by a foreign State to China cannot enter in the discharge of his duties until he receives the *exequatur* from the Chinese government,[32] which may, at any time, withdraw the *exequatur* if it gives a sufficient reason for so doing. The issuance and withdrawal of *exequatur* is explicitly provided for in the treaties concluded

[31] The following is a sample of the Certificate of Appointment of Consul, issued by the Chinese government:

CERTIFICATE OF APPOINTMENT OF CONSUL

President of the Republic of China
To all who shall see these presents, Greeting:

Know ye, that reposing special Trust and Confidence in the ability and integrity of Mr. . . . . , I have nominated and appoint him . . . . . Consul at . . . . . , and do authorize and empower him to have and to hold the said office, and to exercise and to enjoy all the rights, privileges and immunities thereto appertaining, during the pleasure of . . . . . .

In testimony whereof, I have caused these letters to be made patent, and the seal of . . . . . to be hereunto affixed.

Given under my hand, at . . . . , the . . . . . day of . . . . . in the year . . . . . .

(Signed) . . . . . .
(Countersigned) . . . . . .
(SEAL)

(This sample is found in the *Dictionary of Words and Phrases of International Law and Diplomacy in English and French with Chinese Translations*, compiled by the Department of Treaties of the Ministry of Foreign Affairs of the Chinese government, 1925, p. 161.)

[32] The following is a sample of the *Exequatur*, issued by the Chinese government:

EXEQUATUR

President of the Republic of China
To all and singular to whom these presents shall come, Greeting:

Whereas . . . . . has by a Commission of . . . . . day of . . . . . , 19. . . , appointed Mr. . . . . to be . . . . . at . . . . . and I (or We) having approved of this appointment according to the Commission before-mentioned, My (or Our) will and pleasure are, and I (or We) hereby require that you do receive, countenance, and as there may be occasion, favorably assist him the said . . . . . in the exercise of his Office, giving and allowing unto him all the Privileges, Immunities, and Advantages thereto belonging.

Given at . . . . . , the . . . . . day of . . . . . in the year . . . . . .

(Signed) . . . . . .
(Countersigned) . . . . . .

(This sample is found in the *Dictionary of Words and Phrases of International Law and Diplomacy in English and French with Chinese Translations*, p. 164.)

between China and other countries.[33] In the Consular Convention between China and the Netherlands, relative to the Possessions and Colonies of the Netherlands, signed at Peking, on May 8, 1911,[34] for example, China recognizes the Netherlands government to possess such a right. Article III of the Convention reads in part:

"Before being admitted to the exercise of their functions and enjoying all their powers, privileges, exemptions and immunities therewith connected, the consuls-general, consuls, vice-consuls and consular agents must present to the Government of Her Majesty the Queen of the Netherlands, a commission, indicating their consular jurisdiction and their place of residence.

"The government of the possession or colony shall deliver to them, free of cost, the *exequatur* duly countersigned, necessary for the exercise of their functions; and upon having produced this document, the said consular officers of every grade shall be entitled to the protection of the government and to the assistance of the local authorities to ensure to them the free exercise of their functions.

"The Government of the Queen reserves unto itself the right to withdraw the *exequatur* or to have it withdrawn by the government of the possession or colony, stating the reasons for such action."

The most general provision about the issuance and withdrawal of *exequatur* included in other treaties can be well illustrated by the following extract from the Treaty of Commerce between Austria and China, 1925:

"The consuls-general, consuls, vice-consuls, and consular agents shall, before beginning to exercise their functions, obtain the *exequatur* of the Government of the country where they reside. It is understood that the Government that issues the *exequatur*, can withdraw it in case it should have a justified cause for doing so."[35]

[33] See, for example, Art. II of the Treaty of Amity and Commerce between Corea and China, signed at Seoul, September 11, 1899 (Hertslet, Vol. I, No. 37); Art. III of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, December 14, 1899; Art. III of the Treaty of Friendship, Commerce, and Navigation between Sweden and China, signed at Peking, July 2, 1908 (MacMurray, Vol. I, No. 1908/11); Art. II of the Treaty of Amity between Chile and China, February 18, 1915 (*Ibid.*, Vol. 2, No. 1915/2); Art. II of the Treaty of Amity between China and Switzerland, June 13, 1918 (*Ibid.*, Vol. 2, No. 1918/8); Art. II of the Treaty of Friendship between Bolivia and China, December 3, 1919 (*Supplement to MacMurray's Treaties*, pp. 22-23); Art. V of the Treaty of Friendship between Persia and China, signed at Rome, June 1, 1920 (*Ibid.*, pp. 26-27); Art. II of the Treaty of Commerce between Austria and China, signed at Vienna, October 19, 1925 (*Ibid.*, pp. 165-169); Art. II of the Treaty of Amity between Finland and China, signed at Helsingfors, October 29, 1926 (*Ibid.*, pp. 185-186); Art. II of the Treaty of Friendship between Greece and China, signed at Paris, May 26, 1928 (*Ibid.*, pp. 226-228); Art. III of the Treaty of Friendship, Commerce, and Navigation between Poland and China, signed at Nanking, September 18, 1929 (*League of Nations Treaty Series*, Vol. 120 (1932), pp. 360-367); Art. III of the Treaty of Amity and Commerce between China and Czechoslovakia, signed at Nanking, February 12, 1930 (*Ibid.*, Vol. 110 (1931), pp. 302-306).

[34] MacMurray, Vol. I, No. 1911/3.

[35] Art. II, Par. 3.

Termination of Office

According to the general practice of nations, the office of a consul may be terminated through the death of the consul, recall or transfer by his government, expiration of his term, withdrawal of *exequatur* by the receiving government, severance of diplomatic relations (not always), or declaration of war. China has not shown any special attitude different from the general practices. When China first sent consuls abroad, four years were provided as the term of consular officers from the date of their arrival in the districts to which they were appointed.[36] The Temporary Regulations relating to the Transfer of Diplomatic and Consular Officers, promulgated by the Ministry of Foreign Affairs, February 25, 1935, provide that the term of consular officers is regularly four years and that those sent to districts of extreme temperature are to have only two-year terms.[37] Like diplomatic officers, they may, however, be allowed to continue another term.[38] Of course, the Ministry of Foreign Affairs may recall or transfer them even before the expiration of their term.[39] Under any of these conditions, their office will be terminated.

Constant turmoil in the internal affairs of a State was considered by the Chinese government, at least once, as a sufficient cause to suspend consular relations. By the mandate of September 23, 1920, the Chinese government withdrew its recognition of Russian consulates in China.[40] When the Chinese government notified Germany, on March 14, 1917, of the severance of diplomatic relations, passports were immediately issued to the German consuls at the different ports of China.[41] The same action was taken when China declared war against Austria-Hungary, on August 14, 1917.[42]

[36] Art. 4, Regulations for the Guidance of Chinese Envoys, 1877.

[37] Art. 1. For the text of the Regulations, see *C.L.C.R.*/2, Vol. 2, p. 1255. According to Article 7 of the Temporary Regulations governing the Appointment of Diplomatic and Consular Officers, 1933, the term of consular officers sent to districts located in temperate zones was three years, and those sent to districts in the torrid zone had two-year terms.

[38] Art. 1, Temporary Regulations relating to the Transfer of Diplomatic and Consular Officers, 1935.

[39] Art. 17, Organic Law of Diplomatic Missions and Consulates Abroad, 1930.

[40] *Supra*, pp. 128-129. The consular relations between Russia and China were partially resumed as a result of the conclusion of the Agreement between the Union of Soviet Socialist Republics and China, on May 31, 1924 (*Supplement to MacMurray's Treaties*, pp. 133-140).

[41] *Supra*, pp. 129-130.

[42] *Supra*, p. 130.

IV. Rights, Privileges, Exemptions, and Immunities of Consular Officers

Right of Access to and Communication with the Local Authorities on a Footing of Equality

In order to avoid misunderstanding and controversy, the right of foreign consuls sent to the Chinese ports and cities of access to and communication with the local authorities on a footing of equality had been prescribed in the various treaties concluded between China and other countries.[43] The following provision, contained in the Treaty of Peace, Friendship, and Commerce between Great Britain and China, 1858, serves as an example:

"Consuls and Vice-Consuls in charge shall rank with Intendants of Circuits; Vice-Consuls, Acting Vice-Consuls, and Interpreters, with Prefects. They shall have access to the official residences of these officers, and communicate with them, either personally or in writing, on a footing of equality, as the interests of the public service may require." [44]

If the foreign consuls residing in the Chinese ports or cities were aggrieved or mistreated by the local authorities, they might appeal to the Chinese higher authorities for justice. This right was explicitly provided in the Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, of March 20, 1847. Article IV of the Treaty reads in part:

"If disrespectfully treated or aggrieved in any way by the local authorities, said officers on the one hand shall have the right to make representation of the same to the superior officers of the Chinese Government, who will see that full inquiry and strict justice be had in the premises: and on the other hand the said Consuls will carefully avoid all acts of unnecessary offence to, and collision with, the officers and people of China."

The same right was prescribed in other treaties concluded between China and other countries.[45]

[43] See, for example, Art. IV of the Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, signed at Canton, March 20, 1847 (Hertslet, Vol. I, No. 93); Art. X of the Treaty of Peace, Friendship, and Commerce between China and the United States, June 18, 1858; Art. II of the Additional Articles to the Treaty of Commerce between the United States and China of June 18, 1858, signed at Washington, July 28, 1868; Art. IX of the Treaty of Friendship and Commerce between Portugal and China, December 1, 1887; Art. II of the Treaty of Amity and Commerce between Corea and China, September 11, 1899.

[44] Art. VII, Par. 2.

[45] See, for example, Art. X of the Treaty of Peace, Friendship, and Commerce between China and the United States, 1858; and also Art. II of the Additional Articles to the said Treaty, July 28, 1868.

Immunity of Consular Archives and Documents

In the Consular Convention between China and the Netherlands, relative to the Possessions and Colonies of the Netherlands, 1911, the immunity of consular archives and documents was expressly provided for as follows:

"It is understood that the archives and documents relating to consular affairs shall be protected against searches, and no authority and no magistrate may enter the archives nor seize documents nor gain possession of them in any manner and under any pretext whatever." [46]

However, the Chinese government has considered such immunity as conditional. If the foreign consulate in a Chinese district is used as a place of agitating disorder in China, not only may the archives and documents of the consulate be searched, but the consular officers may also be arrested. This happened in July, 1929, when the Soviet consulate at Harbin was used as the center of Bolshevik propaganda in Chinese territory. As a result of the raid upon the consulate, over eighty people were arrested, of whom forty-two were members of the consulate, including Melnikoff, the Soviet consul-general; and the documents seized revealed the plan of Russian interference with the Chinese domestic order.[47]

Exemption from Customs Duties, Personal Taxes, and Military Service

As to the exemption from customs duties of foreign consuls in China, regulations have been laid down by the Chinese government relating to the standard of exemption of duty and procedure for remission of duty.[48] Exemption from military service and personal taxes was formally provided in the Consular Convention between China and the Netherlands, 1911. Article 15 of the Convention reads in part:

"Whereas, in China the same favors are to be reciprocally accorded to the consuls-general, consuls, vice-consuls and consular agents of the Netherlands, therefore the consuls-general, consuls, vice-consuls and consular agents of China, not engaged in trade nor any function or profession other than their consular functions, shall be exempt from all military service, requisitions or billeting, from pecuniary taxes in the place of military service and from any personal

[46] Art. V.
[47] For details, see *China Year Book*, 1931, pp. 495-496.
[48] *Supra*, pp. 134-135.

tax, as well as from general or municipal taxes of a personal nature, unless they are Dutch subjects. This exemption can never be extended so as to include customs or other indirect or direct taxes.

"The consuls-general, consuls, vice-consuls and consular agents who are not Dutch subjects, even if they do not come under the stipulations of the first paragraph of this article, are exempt from all military services, military requisitions and all pecuniary taxes in the place of military service, inasmuch as in China the same privilege is granted to the consuls-general, consuls, vice-consuls and consular agents of the Netherlands."

Consular Jurisdiction

The Treaty of Peace between Great Britain and China of August 29, 1842, marks the beginning of the extraterritorial system in China. Although consular jurisdiction and extraterritoriality are not synonymous, foreign consuls in China have been empowered, since the very beginning, to play a large part in the operation of the extraterritorial system. Article XIII of the General Resolutions supplemental to the said Treaty reads as follows:

"Whenever a British subject has reason to complain of a Chinese he must first proceed to the Consulate and state his grievance. The Consul will thereupon inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese has reason to complain of a British subject, he shall no less listen to his complaint and endeavor to settle it in a friendly manner . If, unfortunately, any disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of a Chinese officer, that they may together examine into the merits of the case, and decide it equitably. Regarding the punishment of English criminals, the English Government will enact the laws necessary to attain that end, and the Consul will be empowered to put them in force; and regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by the correspondence which took place at Nanking, after the concluding of the peace." [49]

In the Treaty between the United States and China of 1844, the provision for consular jurisdiction is more explicit. Article XXI of the Treaty provides the jurisdiction of criminal matters as follows:

"Subjects of China who may be guilty of any criminal act towards citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China, and citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul or other public functionary of the United States thereto authorized according to the laws of the United States; and in order to secure

[49] *Treaties, Conventions, etc., between China and Foreign States,* Vol. 1, p. 388.

the prevention of all controversy and disaffection, justice shall be equitably and impartially administered on both sides." [50]

France by the Treaty of 1844,[51] and Norway and Sweden by the Treaty of 1847,[52] received the same right as Great Britain and the United States. Besides these States, the extraterritorial right was later extended to Russia, the Netherlands, Spain, Italy, Denmark, Germany, Austria-Hungary, Brazil, Peru, Portugal, Japan, Mexico, and Switzerland.[53] Germany, Austria, and Hungary were denied this extraterritorial right after the World War.[54] Russia had practically lost her extraterritorial right in China since the Soviet Revolution,[55] and legally relinquished it by the Sino-Russian Agreement of May 31, 1924.[56]

Since the right of extraterritoriality given to foreign Powers in China is not based upon equality and reciprocity, its continuing existence is a limitation on the exercise of Chinese sovereignty. During recent decades, the Chinese government has tried to get rid of this unilateral system, and the movement was vigorously carried on until 1931, when China's attention of necessity became exclusively occupied with the Japanese invasion.[57]

Other Rights, Privileges, and Immunities

In addition, foreign consuls in China possess other rights, privileges, exemptions, and immunities, under the most-favored-nation treatment and under international law and usage. The most-favored-nation treatment in this respect was provided for in many treaties concluded between China and other countries.[58]

[50] *Treaties, Conventions, etc., between China and Foreign States,* Vol. 1, p. 685.
[51] Hertslet, Vol. 1, No. 39.
[52] *Ibid.,* Vol. 1, No. 93.
[53] See W. W. Willoughby, *Foreign Rights and Interests in China,* Vol. 2, p. 577.
[54] See *ibid.,* Vol. 2, pp. 577-579.
[55] See the Mandate of Suspension of the Recognition of the Russian Legation and Consulates, issued by the President of the Chinese Republic on September 23, 1920 (*China Year Book,* 1921-1922, p. 626).
[56] *Supplement to MacMurray's Treaties,* pp. 133-140.
[57] See *supra,* Ch. III, Sec. III.
[58] See, for example, Art. IX of the Treaty of Friendship and Commerce between Portugal and China, December 1, 1887; Art. III of the Treaty of Commerce and Navigation between China and Japan, July 21, 1896; Art. II of the Treaty of Amity and Commerce between Corea and China, September 11, 1899; Art. III of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, December 14, 1899; Art. XVI of the Consular Convention between China and the Netherlands, May 8, 1911; Art. V of the Treaty of Friendship between Persia and China, June 1, 1920.

Article IV of the Treaty of Friendship, Commerce, and Navigation between China and Peru, June 26, 1874, reads in part:

"These officers shall be treated with due respect by the Chinese authorities, and enjoy the same privileges and immunities as the Consular Officers of the most favored nation.

"All of these officers shall enjoy the same rights and privileges as those of the most favored nation in Peru."

The most-favored-nation clause contained in the treaties between China and other countries cannot extend the right of consular jurisdiction over Chinese nationals residing in foreign districts. This can be shown by the Treaty of Commerce and Navigation between China and Japan:

"These officers (consuls) shall be treated with due respect by the Chinese authorities, and they shall enjoy all the attributes, authority, jurisdiction, privileges, and immunities which are or may hereafter be extended to similar officers of the nation most favored in these respects.

"His Majesty the Emperor of China may likewise appoint Consuls-General, Consuls, Vice-Consuls, and Consular Agents to reside at any or all of those places in Japan where Consular Officers of other nations are now or may hereafter be admitted, and, saving in the matter of jurisdiction in respect of Chinese subjects and property in Japan, which is reserved to the Japanese Judicial Courts, they shall enjoy the rights and privileges that are usually accorded to such officers." [59]

With the exception of the countries mentioned above,[60] consuls of other countries in Chinese districts are not entitled to such a right by the most-favored-nation clause. Therefore, the Treaty of Friendship between Persia and China, 1920, provides:

"Both of the High Contracting Parties shall be entitled to appoint Consuls-General, Consuls, Vice-Consuls or Consular Agents, to be stationed in the principal towns or in the ports of the other party, wherever such officials are permitted to reside; and, except as regards the rights of consular jurisdiction, they shall enjoy the same privileges as the consular representatives of the most-favored nations." [61]

Besides most-favored-nation treatment, the consular officers enjoy the rights, privileges, exemptions, and immunities to which they are entitled by international law and usage. Article III of the Additional Articles to the Treaty of Commerce of June 18, 1858, between the United States and China, signed on July 28, 1868, reads:

[59] Art. III, Pars. 2-3.
[60] *Supra*, pp. 151-152.
[61] Art. V, Par. 1.

"The Emperor of China shall have the right to appoint Consuls at ports of the United States, who shall enjoy the same privileges and immunities as those which are enjoyed by public law and Treaty in the United States by the Consuls of Great Britain and Russia, or either of them."

The treatment of foreign consuls by the Chinese government according to international law and usage is expressly provided for in the Temporary Regulations governing the International Relations of China with Foreign Countries, When the Old Treaties Have Been Terminated and the New Treaties Have Not Yet Been Concluded, promulgated by the National Government, on July 9, 1928.[62] The same provision was laid down in the Note sent by Dr. Wellington Koo, Minister of Foreign Affairs, on November 6, 1926, to M. le Maire de Warzee d'Hermalle, Belgian Minister to Peking, denouncing the Sino-Belgian Treaty of 1865,[63] and in the Statement of the Chinese government, on November 10, 1927, explaining the termination of the Sino-Spanish Treaty of October 10, 1864.[64]

V. Functions and Duties of Consular Officers

The Organic Law of Diplomatic Missions and Consulates Abroad, 1930, provides:

"Consuls general, consuls, and vice-consuls in charge shall comply with the orders of the Ministry of Foreign Affairs in protecting Chinese residents within the territory under their jurisdiction and Chinese trade abroad and in supervising members of the staff under their control." [65]

This provision gives only a general sketch of the consular officers' functions and duties, which, according to the Chinese laws and treaty provisions, can be further classified as follows:

(1) to take charge of matters concerning passports;[66]

(2) to register the Chinese residing in their consular districts in order to give governmental protection;[67]

[62] *Supra*, pp. 136-137.
[63] *Supra*, p. 137.
[64] *Supra*, p. 137.
[65] Art. 10.
[66] Arts. 6, 12, 15, Rules governing the Issuance of Chinese Passports, promulgated by the National Government, January 31, 1931 (*C.L.C.R./2*), Vol. 2, pp. 1269-1270); Art. 2, Rules governing the Examination of the Passports of Alien Immigrants, promulgated by the Executive *Yuan*, August 22, 1930 (*Ibid.*, Vol. 2, p. 1270).
[67] Art. 2, Rules relating to the Registration of Chinese Abroad, enacted by the 33rd Session of the Standing Committee of the Central Executive Committee of the Nationalist Party. September 5, 1929 (*Ibid.*, Vol. 2, p. 1286); Administrative Rules relating to the Registration of Chinese Abroad, promulgated by the Ministry of Foreign Affairs, January 17, 1930 (*Ibid.*, Vol. 2, p. 1286).

(3) to sign and issue the consular invoices;[68]

(4) to serve as witness of the wills made by Chinese residing in their consular districts;[69]

(5) to investigate evidence abroad for the Chinese courts;[70]

(6) to deal with matters connected with the death of Chinese nationals abroad without known heirs or testamentary executors, and to administer temporarily the estates of Chinese nationals residing in their consular districts who die intestate;[71]

(7) to sign and prove the transfer of ownership of Chinese vessels in foreign ports within their consular districts;[72]

(8) to sign on the 'records of navigation' the time and date of Chinese ships arriving at and departing from the foreign ports within their consular districts;[73]

(9) to have jurisdiction over all controversies arising aboard Chinese ships either at sea or in foreign ports, unless the controversies are of such a nature as to disturb the peace and public order on shore or in the ports;[74] and

(10) to direct the operations regarding the salvage of Chinese ships wrecked on the coasts of foreign countries, and to settle matters relating to damages of Chinese ships suffered at sea.[75]

VI. Restrictions Upon Consular Officers

By municipal laws and treaty provisions, the Chinese government has imposed upon its consular officers many restrictions, the purpose of which is to preserve and increase their usefulness. Among these restrictions, the following are comparatively important:

[68] Regulations relating to the Signing and Issuing Consular Invoices by the Consuls Abroad, promulgated by the National Government, on June 11, 1932, and finally revised on July 2, 1932 (*C.L.C.R./2*, Vol. 2, pp. 1262-1263).

[69] Art. 1191, Par. 2, Civil Code, promulgated by the National Government, May 23, 1929 (*Ibid.*, Vol. 1, pp. 37-89).

[70] Art. 295, Regulations relating to Civil Procedure promulgated by the National Government, February 1, 1935 (*Ibid.*, Vol. 1, pp. 175-205).

[71] Art. XII of the Consular Convention between China and the Netherlands, May 8, 1911; Art. X of the Treaty of Commerce between Austria and China, October 19, 1925.

[72] Art. 10, Code of Maritime Commerce, promulgated by the National Government, on December 30, 1929 (*C.L.C.R./2*, Vol. 1, pp. 112-120).

[73] *Ibid.*, Art. 48.

[74] Art. XIV of the Consular Convention between China and the Netherlands, May 8, 1911.

[75] *Ibid.*, Arts. XI, XII.

(1) They are not invested with any diplomatic powers.[76]

(2) They should not engage in business or industry; or in other words, consular officers, except honorary consuls, must be non-traders.[77]

(3) They should not support the demands of Chinese nationals if provocative or offensive to the authorities or inhabitants of the places of their sojourn.[78]

(4) The consulates have no right of asylum, and, instead, the residence and dwellers may be proceeded against by the courts of justice of the countries of their sojourn.[79]

(5) They should not reveal affairs of a secret character.[80]

(6) They should not commit any action which might have a bad effect upon public affairs or upon their reputations;[81] nor omit any action which might have a positive effect.

(7) They should not participate in any factions or clubs organized by the Chinese abroad, or engage in any newspaper work or business.[82]

(8) The subordinates of the consulates should first get permission from the consulate-general, consuls, or vice-consuls before doing any work requested by the Chinese residing in their consular districts.[83]

[76] Art. VI of the Consular Convention between China and the Netherlands, May 8, 1911.

[77] This restriction was included in almost all the treaties which China has concluded with other countries in connection with consular relations. See, for example, Art. IV of the Treaty of Amity, Commerce, and Navigation between China and Spain, October 10, 1864; Art. IV of the Treaty of Friendship, Commerce, and Navigation between China and Peru, June 26, 1874; Art. IX of the Treaty of Friendship and Commerce between Portugal and China, December 1, 1887; Art. II of the Treaty of Amity and Commerce between Corea and China, September 11, 1899; Art. II of the Treaty of Amity between Chile and China, February 18, 1915; Art. II of the Treaty of Amity between China and Switzerland, June 13, 1918; Art. II of the Treaty of Friendship between Bolivia and China, December 3, 1919; Art. V of the Treaty of Friendship between Persia and China, June 1, 1920; Art. II of the Treaty of Commerce between Austria and China, October 19, 1925; Art. II of the Treaty of Amity between Finland and China, October 29, 1926; Art. II of the Treaty of Friendship between Greece and China, May 26, 1928; Art. III of the Treaty of Friendship, Commerce, and Navigation between Poland and China, September 18, 1929; Art. III of the Treaty of Amity and Commerce between China and Czechoslovakia, February 12, 1930.

[78] Art. III of the Treaty of Friendship, Commerce, and Navigation between China and Mexico, December 14, 1899.

[79] Art. IV of the Consular Convention between China and the Netherlands, May 8, 1911.

[80] Art. 4, Regulations governing the Consular Service, promulgated by the Ministry of Foreign Affairs, on December 15, 1917 (*C.L.C.R./2*, Vol. 2, pp. 1254-1255).

[81] *Ibid.*, Art 3.

[82] *Ibid.*, Art. 5.

[83] *Ibid.*, Art. 6.

(9) After appointment they should go to their offices promptly, without unnecessary delay.[84]

(10) They should not ask leave to return to China during the period of national emergency, except under such conditions as are applied to diplomatic officers.[85]

(11) They should not marry foreign wives. If such marriages were concluded before the promulgation of the Rules of 1934, they might continue in consular service. The government, should, however, avoid appointing them to the countries of which their wives were or still are nationals.[86]

[84] Art. 5, Regulations governing the Process of Assuming Office of the Diplomatic and Consular Officers after Appointment, promulgated by the Ministry of Foreign Affairs on August 27, 1929, and revised on November 29, 1930 (*C.L.C.R.*/2, Vol. 2, p. 1261).

[85] Art. 1, Temporary Regulations governing the Asking of Leave of the Diplomatic and Consular Officers for Return to China, promulgated by the Ministry of Foreign Affairs on June 1, 1933, and finally revised on March 16, 1934 (*Ibid.*, Vol. 2, p. 1262). See *Supra*, p. 139.

[86] See the Rules prohibiting the Persons in Military and Diplomatic Services to Marry Foreign Wives, promulgated by the National Government in November, 1934. Notwithstanding that the title of the Rules is limited to persons in military and diplomatic services and that the status of diplomatic officers is different from that of consular officers, these Rules are also applied to the latter, especially in view of the provision of Article 2, No. 2.

CHAPTER VII

PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

I. In General

INTERNATIONAL LAW is concerned not only with legal matters but also with political differences between States. In former times, war was generally recognized as an appropriate means of self-help for settling international disputes. Like other nations, China had, before the nineteenth century, made many wars with her neighboring States and tribes. The Hague Conferences of 1899 and 1907 can, perhaps, be said to mark the beginning of attempts to limit war as an instrument of national policy. China was a participant in both Conferences, and she is party to and is bound to observe the Convention for the Pacific Settlement of International Disputes.[1] The establishment of the League of Nations marked further progress in the movement to restrict recourse to war. The Covenant of the League definitely provides various pacific means of settling legal and political differences between States.[2] Being a member of the League of Nations,[3] China has consistently relied on it as an organ to maintain world peace, notwithstanding its manifest failure, since 1931, in settling the Sino-Japanese controversy.

On August 27, 1928, a General Treaty for Renunciation of War was signed at Paris by representatives of fifteen Governments.[4] The Treaty, generally referred to as the Kellogg-Briand Pact or the Pact of Paris, is now binding upon more than sixty nations including China.[5] The essential points of the Treaty are the following:

[1] A. P. Higgins, *The Hague Peace Conferences and Other International Conferences concerning the laws and Usages of War* (hereafter cited as Higgins, *Hague Peace Conferences*), pp. 97-179; J. B. Scott, *The Reports to the Hague Conferences of 1899 and 1907*, pp. 32-125, 292-488.

[2] The pertinent provisions of the Covenant are Articles 10-17.

[3] An annex to the Covenant named thirty-two signatories of the treaty of peace as original members of the League of Nations. China did not sign the Treaty of Versailles, but, as a result of her ratification of the Treaty of St.-Germain-En-Laye in 1920, she became automatically a member of the League.

[4] *League of Nations Treaty Series*, Vol. 94 (1929), pp. 57-64.

[5] For a list of the States bound by the Treaty, see *Brit. Yr. Bk. Int. Law*, Vol. 15 (1934), p. 139. China acceded to the Treaty on November 27, 1928. Its ratification by the National Government took place in March, 1929.

"The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.

"The High Contracting Parties agree that the settlement of solution of all disputes or conflicts, of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means." [6]

By this Treaty the Signatories have renounced war as an instrument of national policy. Theoretically speaking, all disputes arising between States parties to the Treaty are to be settled by pacific means. Unfortunately, facts are not in accord with theory. Since the conclusion of the Kellogg-Briand Pact, China has been invaded four times by foreign forces: by Soviet Russia in the case of the attack on North Manchuria in 1929; by Japan in the case of the occupation of Manchuria in 1931; again by Japan in connection with the Shanghai hostilities in 1932; and, finally, by Japan which has conducted an undeclared war throughout China since July 7, 1937. In all these cases, the other Signatories of the Treaty have done little effectively to stop the invasions. Nevertheless, and in spite of deep disappointment among the people, the Chinese Government still holds to the principle of pacific settlement of international disputes.

II. Settlement of International Disputes by Amicable Means

International disputes can be settled by either amicable or compulsive means. There are, in general, the following kinds of amicable means: negotiation, good offices, mediation, conciliation, commission of inquiry, arbitration, and judicial settlement. Being bound by the Hague Convention for the Pacific Settlement of International Disputes, the Covenant of the League of Nations, the Kellogg-Briand Pact, and many treaties, the Chinese Government has ever been willing to resort to amicable means for solving international differences with other nations.

Negotiation

Negotiation is the normal mode of dealing with international differences. Usually the Ministry of Foreign Affairs and the diplo-

[6] Arts. I, II.

matic missions abroad take charge of such negotiations. A large number of the disputes between China and other nations have been disposed of in this way. Certain controversies of grave aspect settled through diplomatic negotiation may be pointed out as examples: the Russian occupation of Ili, 1871;[7] the Formosa incident, 1874;[8] the Margary affair in Yunnan, 1874;[9] the Shantung problem after the World War;[10] the Nanking incident, 1927;[11] the Tsinan incident, 1928;[12] and the tariff autonomy of China achieved by the Nationalist Government.[13]

Good Offices and Mediation

Good offices are the services offered by the third State or States with a view to calling for negotiations between the Parties at variance, which, however, have no obligation to accept them. Mediation is the consequence of the tender of good offices and consists of the actual transmission of suggestions. Although there is a theoretical distinction between good offices and mediation, diplomatic practice and treaties do not always distinguish them.[14]

The Chinese Government has considered good offices and mediation as a favorable means for the settlement of disputes between China and other nations, as shown by treaties and diplomatic correspondence. When China concluded the Treaty of Peace, Friendship, and Commerce with the United States in 1858,[15] the use of good offices was provided for in the following clause:

"There shall be, as there have always been, peace and friendship between the United States of America and the Ta-Tsing Empire, and between their people, respectively. They shall not insult or oppress each other for any trifling cause, so as to produce an estrangement between them; and if any other nation should act unjustly or oppressively, the United States will exert their good offices, on being informed of the case, to bring about an amicable arrangement of the question, thus showing their friendly feelings." [16]

[7] H. B. Morse, *The International Relations of the Chinese Empire*, Vol. 2, Chapter XVI.
[8] *Br. and For. St. Papers*, Vol. 66 (1874-75), pp. 424-431.
[9] H. B. Morse, *op. cit.*, Vol. 2, Chapter XIV.
[10] W. W. Willoughby, *Foreign Rights and Interests in China*, Vol. 1, Ch. XI.
[11] A. J. Toynbee, *Survey of International Affairs*, 1927, pp. 382-394; 1928, pp. 413-418.
[12] *Ibid.*, 1938; pp. 403-413; *Supplement to MacMurray's Treaties*, pp. 274-275.
[13] M. T. Z. Tyau, *Two Years of Nationalist China*, pp. 102-103.
[14] See C. C. Hyde, *International Law Chiefly As Interpreted and Applied by the United States*, Vol. 2, p. 101; L. Oppenheim, *International Law*, Vol. 2, p. 10.
[15] Hertslet, Vol. 1, No. 94.
[16] Art. I.

The Treaty of Amity and Commerce between Corea and China of 1899 provided:[17]

"If other Powers should deal unjustly or oppressively with either Government, the other, on being informed of the case, will exert their good offices to bring about an amicable arrangement." [18]

Besides bilateral treaties, China is obligated to observe the Hague Convention for the Pacific Settlement of International Disputes in relation to good offices and mediation.[19]

Because of the exercise of good offices and mediation on the part of a third State or States, some serious controversies between China and other nations have been peacefully settled. The settlement of the Formosa incident, 1874-75, was mainly due to the efforts of Mr. Wade, the British minister at Peking, whose good offices were appreciated by both China and Japan.[20] Again, from the time of the Peace Conference of Versailles, China and Japan took opposite attitudes toward the settlement of the Shantung problem: the former held that it should be discussed by the parties in concert with other interested Powers, while the latter insisted upon direct negotiation. Thus the matter remained at a deadlock until 1921, when the Washington Conference was convened. Through the good offices of Mr. Charles Evans Hughes of the United States and Mr. Arthur James Balfour of the British Empire, a satisfactory conclusion was finally reached. In this connection, Mr. Sze Sao-Ke, representing the Chinese delegation, gave the following statement:

"The Chinese Delegation has not solicited or asked for the meeting of the Chinese and Japanese Delegations, as the Government and people of China have always hoped to be able to present this very important question to the consideration of the Conference, not with any desire to add to the labors of the Conference or to embarrass any Delegation interested in this question, but merely to the hope of obtaining a fair and just settlement. The Chinese Government, however, deeply appreciate the friendly sympathy and interest which Mr. Hughes and Mr. Balfour, representing two great Powers equally friendly to China and Japan, have manifested in offering their good offices, and the Chinese Delegation, therefore, have the great pleasure of accepting the kind offer, of course in the hope that a fair and just settlement may be

[17] Hertslet, Vol. 1, No. 37.

[18] Art. I, Par. 2.

[19] Part II, Convention for the Pacific Settlement of International Disputes (Higgins, *Hague Peace Conferences*, pp. 103-107).

[20] See *Correspondence respecting the Settlement of the Difficulty between China and Japan in regard to the Island of Formosa*, 1874, 1875 (*Br. and For. St. Papers*, Vol. 66 (1874-75), pp. 422-431).

soon reached and reported to the Conference, and without qualifying its freedom to seek other methods of settlement in the unhappy event of inability to reach an agreement for a fair and just settlement." [21]

Still again, the Shanghai Peace Agreement between China and Japan concluded on May 5, 1932, was largely due to the exercise of good offices by the diplomatic representatives of Great Britain, the United States, France, and Italy, and their military attachés.[22]

Conciliation and Inquiry

Notwithstanding the fact that conciliation is a development of international commissions of inquiry, there is a sharp distinction between these two: inquiry is a method primarily for the purpose of an impartial ascertainment of the facts, while conciliation is to enlist the active services of a commission of persons in bringing the disputing parties to an agreement. Thus conciliation goes one step further than inquiry in that it is not only to find the facts but also to propose an accord. Although the parties at variance have no obligation to adopt the proposal, a settlement can sometimes be reached through compromise. For example, the method of settling international disputes provided in Articles 11 and 15 of the Covenant of the League of Nations, later discussed,[23] is of the nature of conciliation.

International commissions of inquiry were provided for in the Hague Convention for the Pacific Settlement of International Disputes, to which China is a party.[24] Articles 9 and 10 of the Convention of 1907 provide:

"In disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the Contracting Parties deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

"International Commissions of Inquiry are constituted by special agreement between the contending parties.

"The Inquiry Convention defines the facts to be examined: it determines the manner and period within which the Commission is to be formed and the extent of the powers of the Commissioners."

[21] *Conference On the Limitation of Armament, Washington, November 12, 1921-February 6, 1922*, p. 1036.

[22] *China Year Book, 1932-33*, p. 680.

[23] See *infra*, pp. 164-168.

[24] Pt. III, Convention for the Pacific Settlement of International Disputes (Higgins, *Hague Peace Conferences*, pp. 107-121).

The Treaty for the Advancement of the General Cause of Peace between the United States and China, signed at Washington, September 15, 1914,[25] is one of a series of the well known Bryan Treaties. During the period of 1913-1914, Mr. Bryan, Secretary of State of the Government of the United States, negotiated with other Governments thirty treaties, in which the principles of the commission of inquiry as formulated by the Hague Conferences were incorporated. Twenty treaties actually came into force: eleven with Latin-American countries, nine with European Powers, and only one with an Asiatic country, namely, China. In several respects, the Bryan Treaties went beyond the Hague provisions. This can be shown by a brief description of the Sino-American Treaty of 1914. Article II of the Treaty prescribes the organization of the commission of inquiry in the following manner:

"The International Commission shall be composed of five members appointed as follows: Each Government shall designate two members, only one of whom shall be of its own nationality; the fifth member shall be designated by common consent and shall not belong to any of the nationalities already represented on the Commission; he shall perform the duties of President.

"In case the two Governments should be unable to agree on the choice of the fifth commissioner, the other four shall be called upon to designate him, and an understanding between them, the provisions of article 45 of the Hague Convention of 1907 shall be applied."

If there is a controversy between the two Contracting Parties, each of them has the right to ask the Commission to make an investigation thereof. The procedure was provided for in Article V of the Treaty:

"As regards the procedure which it is to follow, the Commission shall as far as possible be guided by the provisions contained in articles 9 to 36 of Convention 1 of The Hague of 1907.

"The High Contracting Parties agree to afford the Commission all means and all necessary facilities for its investigation and report.

"The work of the Commission shall be completed within one year from the date on which it has taken jurisdiction of the case, unless the High Contracting Parties should agree to set a different period.

"The conclusion of the Commission and the terms of its report shall be adopted by a majority. The report, signed only by the President acting by virtue of his office, shall be transmitted by him to each of the Contracting Parties.

[25] MacMurray, Vol. 2, No. 1914/10.

"The High Contracting Parties reserve full liberty as to action to be taken on the report of the Commission."

The merits of the procedure specified in the above Treaty are manifest. First, it can be applied to all disputes without exception; second, the investigation is made by a permanent commission and, owing to its impartial constitution, fairness can be assured to the parties at variance; third, the cooling-off interval of one year is psychologically valuable; and last but not the least, because of the impartial investigation and publication of the findings, the force of public opinion as a sanction upon the guilty party is very strong even though not legally binding.

According to the provisions of the Treaty, the Commission as described above should have been organized within six months from the exchange of ratifications by the Contracting Parties.[26] The ratifications were exchanged on October 22, 1915, but the date of the organization of the Commission was later extended from April 22, 1916 to August 1.[27] The following commissioners were eventually appointed to organize the Commission:[28]

1. Commissioners on the part of the United States:
   National: Frank J. Goodnow
   Nonnational: H. J. Horst (Norway)
2. Commissioners on the part of China:
   National: V. K. Wellington Koo
   Nonnational: (vacant)
3. Joint commissioner: Knut Hjalmar Leonard de Hammarskjöld (Sweden)

China's willingness to settle international disputes through conciliation can be well shown in the Manchurian incident. When Japan invaded Manchuria on September 18, 1931, the Chinese government strictly observed the provisions of the League Covenant, and, instead of resisting by force, immediately appealed to the League of Nations in accordance with Article 11. In his communication submitted to the Secretary-General of the League on September 21, Dr. Sze Sao-Ke, the Chinese delegate, stated:

"I am instructed by the National Government of China to bring to your attention the facts stated below, and to request that, in virtue of Article

[26] See Art. II, Par. 3.
[27] See MacMurray, Vol. 2, pp. 1171-1172.
[28] See *Press Releases*, 1929-1930, p. 126. Released December 17, 1929. Available sources do not indicate the date of the appointment of these commissioners.

Eleven of the Covenant of the League of Nations, you forthwith summon a meeting of the Council of the League in order that it may take such action as it may deem wise and effectual so that the peace of nations may be safeguarded."

After describing the situation in Manchuria, he concluded the communication with the following words, which definitely indicate that China would act in conformity with whatever conciliatory measure the League might take in settling the dispute:

"I will add that the Government of China is fully prepared to act in conformity with whatever recommendations it may receive from the Council, and to abide by whatever decisions the League of Nations may adopt in the premises."

At the meeting of the Council, held on September 28, Dr. Sze noted that for an accurate investigation of the situation in Manchuria with a view to effecting the early withdrawal of the Japanese forces therefrom there was a necessity for the early dispatch of a neutral commission and that such a commission would be welcomed by China.[29] A Resolution providing for the sending of a Commission of Inquiry was finally adopted at the Council meeting of December 10.[30] The following is an excerpt from the Resolution:

"Desirous to appoint a Commission of five members to study on the spot and to report to the Council on any circumstance which, affecting international relations, threatens to disturb peace between China and Japan, or the good understanding between them, upon which peace depends.

"The Governments of China and Japan will each have the right to nominate one assessor to assist the Commission." [31]

The Commission was composed of Count Aldrovandi (Italian), General Henri Claudel (French), Lord Lytton (British), Major-General Frank R. McCoy (American), and Dr. Heinrich Schnee (German).[32] Lord Lytton was unanimously elected as Chairman of the Commission. As assessors to assist the Commission, the Chinese and the Japanese Governments appointed Dr. V. K. Wellington Koo and Mr. Isaburo, respectively. The Commission was formally constituted at the middle of January, 1932, and reached the Far East at the end of February. The Chinese government afforded the Commission all facilities to obtain in China whatever information it might

[29] See *League of Nations Official Journal*, Vol. 12 (1931), Pt. 2, p. 2291.
[30] See *ibid.*, Vol. 12 (1931), Pt. 2, pp. 2374-2375.
[31] *Ibid.*, p. 2374.
[32] Mr. Walker D. Hines was first proposed as the American member, but he declined to serve.

require, and Memoranda containing various phases of the Sino-Japanese dispute for its reference. In the Memoranda, the Chinese government expressed its hope that the Commission would function upon an equitable basis and within the sphere of the stipulations of the existing treaties.[33]

The Report of the Commission of Inquiry was made public on October 1, 1932. It consists of ten chapters.[34] Based upon a careful investigation and analysis of the Sino-Japanese dispute, the Report recommends ten general principles as the basis for the final settlement of the dispute:

1. Compatibility with the interests of both China and Japan.
2. Consideration for the interests of the U.S.S.R.
3. Conformity with existing multilateral treaties.
4. Recognition of Japan's interests in Manchuria.
5. The establishment of new treaty relations between China and Japan.
6. Effective provision for the settlement of future disputes.
7. Manchurian autonomy.[35]
8. Internal order and security against aggression.
9. Encouragement of an economic rapprochement between China and Japan.
10. International co-operation in Chinese reconstruction.[36]

The Report was transmitted to the Assembly under a resolution adopted at the meeting of the Council on November 28. With reference to the ten principles, Mr. Quo Tai-chi, the Chinese delegate to the League, stated, at the Assembly meeting of December 9, as follows:

"China is ready to take these principles as a basis of discussion provided the resolutions of September 30th and December 10th, 1931, are enforced, provided the principles of the report are taken as a whole and provided they are all interpreted in the light of the third principle—namely, that any solution must conform to the provisions of the Covenant, the Pact of Paris and the Nine-Power Treaty. On this clear understanding, China will accept them, together with the resolution of March 11th, as the basis upon which, and the framework within which, practical negotiations can be begun."

[33] See *Memoranda presented to the Lytton Commission by V. K. Wellington Koo, Assessor* (hereafter cited as Koo, *Memoranda*), Vol. 1, pp. 66-67.

[34] For the Report of the Commission, see League Doc. C. 663. M. 320. 1932. VII.

[35] Manchurian autonomy means that the government of Manchuria should be modified in such a way as to secure, consistently with the sovereignty and administrative integrity of China, a large measure of autonomy designed to meet the local special conditions.

[36] For details, see Ch. IX of the Report.

Under a resolution of the Assembly meeting of the same date, a Special Committee of Nineteen was instituted to seek some conciliatory measures for settling the dispute. However, the work of the Special Committee was obstructed by Japan's attitude, especially by its insistence that there be no exclusion of the recognition of the independence of Manchukuo from any settlement that might be made. The futile efforts at conciliation made by the League since September 21, 1931, were briefly reviewed by the President of the Assembly at the sixteenth plenary meeting of the Assembly, held on February 21, 1933:

"Such, then, is the situation with which the League of Nations is faced today. Since September 21st, 1931, first the Council and then the Assembly have endeavoured to settle the dispute in agreement with the parties, in accordance with the articles of the Covenant in virtue of which the matter was referred to them. For exactly seventeen months the efforts at conciliation have been pursued. At the outset of the dispute, the Council received an assurance that the withdrawal of the Japanese troops into the zone of the South Manchurian Railway, which had already been begun, would be pursued as rapidly as possible in proportion as the safety of the lives and property of Japanese nationals was effectively assured, and that Japan hoped to carry out this intention in full as speedily as possible.

"Today, the Three Eastern Provinces are occupied; Japanese troops have crossed the Great Wall and attacked Shanhaikwan; it is announced that operations are being prepared for the occupation of the province of Jehol.

"The procedure of conciliation is, of course, not yet closed. It cannot be formally closed until the adoption by the Assembly of the report provided for in Article 15, paragraph 4, of the Covenant. I hesitate, however, to make a new appeal with a view to conciliation, for it would be necessary not only that fresh proposals which the Assembly could accept should be made to it, but also that it should receive an assurance that the existing situation would not be aggravated and that no fresh military operations would be undertaken." [37]

After the failure of its attempts at conciliation, the Special Committee, in pursuance of Article 15, paragraph 4 of the Covenant, prepared a draft report, which was adopted by the Assembly without amendment at the seventeenth plenary meeting, held on February 24, 1933. As one of the disputing parties, China voted for its adoption. The report consists of four parts, with suggestions based on the Lytton Report.[38] The procedure of conciliation was formally closed, when the Japanese government gave notice of its

[37] *League of Nations Official Journal*, Special Supplement, No. 112, p. 13.
[38] See League Doc. A (Extr). 22. 1933. VII.

intention to withdraw from the League on March 27, 1933. It is evident that Japan alone should be responsible to the failure of settling the Manchurian dispute, because the Chinese government has fully co-operated with the League in its attempt at conciliation.

Arbitration

Different from negotiation, good offices, mediation, conciliation and inquiry, arbitration is a measure of settling international disputes through a legal decision of one or more persons chosen by the parties at variance. Even before the Hague Peace Conferences, China had adopted arbitration as an effective means for the settlement of disputes with other countries. The Ashmore Fishery case at Swatow in 1884, may be cited as an example. The fishery in question, locally known as the Sun Bue fishery, was purchased by Mr. Ashmore, an American national, in 1872 from the Chinese owner and enjoyed by him without molestation until 1881, when it was encroached upon by a newly organized Chinese fishery company. Mr. Ashmore complained to the Cheng Hai magistrate against the trespassers, but failed to obtain redress. In 1884, Mr. John Russell Young, the United States minister at Peking, visited Swatow and negotiated with the Chinese authorities as to the merits of the controversy. Both parties finally agreed to request the British and Dutch consuls at Swatow to arbitrate the case. The arbitrators awarded to the plaintiff a sum of $4,600, which was duly paid.[39]

China is bound by the Hague Convention for the Pacific Settlement of International Disputes, which provides arbitration as one of the means for achieving such settlement. In accordance with the provisions of the said Convention,[40] the Permanent Court of Arbitration was established at The Hague in 1902. No case has, however, been submitted by the Chinese government to the Court for arbitration, nor has any Chinese national been chosen as arbitor by the disputing parties.[41]

With slight verbal changes, the Convention of 1899 and that of 1907 provide that, independently of general or private treaties

[39] See J. B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been A Party*, Vol. 2, pp. 1857-1859.

[40] See Pt. IV, Chs. 2-4.

[41] See J. W. Garner, *Recent Developments in International Law*, p. 481; J. B. Scott, *The Hague Court Reports* (2 series).

expressly stipulating recourse to arbitration as obligatory, the Contracting Powers shall have the right to conclude new agreements for the extension of compulsory arbitration to all cases which they may think feasible to submit. In pursuance of this provision, China concluded an Arbitration Convention with the United States on October 8, 1908.[42] It is the first of the bilateral treaties of arbitration between China and other nations. The Convention reads in part:

"Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties.

"In each individual case the High Contracting Parties before appealing to the Permanent Court of Arbitration shall conclude a special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure. It is understood that such special agreements will be made on the part of the United States by the President of the United States by and with the advice and consent of the Senate thereof."[43]

The Arbitration Convention between Brazil and China, signed at Peking on August 3, 1909,[44] is similar to the Sino-American Convention of 1908 with the exception of one further provision that, if one of the two Contracting Parties should prefer, all arbitration resulting from the Convention should be submitted to a Head of a State, to a friendly Government, or to one or more arbitrators outside the list of the Tribunal of The Hague.[45] According to both the Sino-American and the Sino-Brazilian Conventions, disputes affecting the vital interests, the independence, the honor of the contracting parties, and the interests of third States were excluded from arbitration. Such a reservation naturally limited the use of arbitration as an effective means to solve international controversies.

With a view to consecrating the principle of obligatory arbitration in their mutual relations by a general agreement of the character contemplated in Article 40 of the Convention for the Pacific Settle-

[42] MacMurray, Vol. 1, No 1908/14
[43] Arts I, II
[44] MacMurray, Vol. 1, No. 1909/5.
[45] Art I

ment of International Disputes, formulated by the Hague Peace Conference of 1907, the Governments of China and the Netherlands concluded a treaty on June 1, 1915, providing for obligatory arbitration.[46] This treaty marked a step forward in that it included all disputes without the reservations mentioned above. Article 1 of the treaty reads:

"The high contracting parties bind themselves to submit to the Permanent Court of Arbitration all such disputes as might happen to arise between them, and which it might not have been possible to resolve by diplomatic means, even in the event that these disputes might have had their origin in facts preceding the conclusion of the present convention."

However, save in the case of denial of justice, questions within the competence of the national judicial authorities in accordance with their respective municipal laws are not to be submitted for arbitration before the competent national jurisdiction shall have given final judgment thereon.[47]

Since both China and the United States have become Signatories of the Kellogg-Briand Pact, denouncing war as an instrument for the settlement of international disputes, the conclusion of a new arbitration treaty was suggested by Mr. Frank B. Kellogg, American Secretary of State, in a note to Dr. C. C. Wu, Chinese minister at Washington, on December 21, 1928. The Chinese government was evidently enthusiastic regarding this suggestion, and, after repeated exchanges of views, the proposed treaty was finally signed at Washington on June 27, 1930.[48] The purpose of the conclusion of the Treaty by the two countries, as its preamble states, was "not only to demonstrate their condemnation of war as an instrument of national policy in their mutual relations, but also to hasten the time when the perfection of international arrangements for the pacific settlement of international disputes shall have eliminated forever the possibility of war among any of the Powers of the world." However, still excluded from arbitration are disputes:

1. Within the domestic jurisdiction of either of the High Contracting Parties;
2. Involving the interests of third Parties;
3. Depending upon or involving the maintenance of the tradi-

[46] MacMurray, Vol. 2, No. 1915/9.
[47] Art. 6.
[48] For the text, see *League of Nations Treaty Series*, Vol. 140 (1934), pp. 184-186.

tional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine;

4. Depending upon or involving the observance of the obligations of China in accordance with the Covenant of the League of Nations.[49]

China is bound by Article 12 of the League Covenant by which it is provided that the members of the League shall submit any dispute likely to lead to a rupture of their relations, either to arbitration, judicial settlement, or inquiry by the Council, and that they shall not resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council. The Chinese government has observed its obligation in this respect, even when China's territorial sovereignty was violently encroached upon by the Japanese invasion of Manchuria in 1931. At the meeting of the session of the Council, held on October 24, 1931, the Chinese delegation sent to the President of the Council a formal communication, which offered to submit all Sino-Japanese controversies over treaty interpretation to arbitration or judicial settlement. In the same communication, the Chinese government expressed its wish to conclude with Japan a treaty of arbitration similar to that concluded between China and the United States in 1930 or to those concluded in recent years between members of the League.[50] Since the Japanese government decided to resort to force, all such proposals were in vain.

Judicial Settlement

While an arbitration tribunal is only an *ad hoc* body, consisting of judges selected by the parties at variance, a judicial court is a permanent tribunal, composed of a fixed number of judges. Thus the latter has a definite advantage over the former in its corporate continuity and in the consequent possibility of its building up a consistent body of case law. The establishment of the Permanent Court of International Justice at The Hague marked a further step forward in the efforts to achieve pacific settlement of international disputes.

[49] See Art. II.

[50] See W. W. Willoughby, *The Sino-Japanese Controversy and the League of Nations*, pp. 128-129.

In accordance with Article 14 of the Covenant, the Council of the League of Nations, at its second session in February, 1920, appointed a group of distinguished jurists to frame a project for the establishment of the Permanent Court of International Justice.[51] The Advisory Committee of Jurists submitted a Draft Statute of the Court to the Council on August 5, 1920,[52] which, after a series of discussions and amendments in the Council and the Assembly, was finally adopted by the Assembly on December 13, 1920.[53] As China was not a member of either the Advisory Committee of Jurists or the Council in 1920, no Chinese views with respect to the Draft Statute were expressed in the discussions of these bodies. China was represented on the Third Committee of the first Assembly, which also considered the Draft Statute, but the Chinese delegate took no part in the Committee discussion.[54] However, at the twenty-first plenary meeting of the First Assembly, held on December 13, Dr. V. K. Wellington Koo, in behalf of the Chinese delegation, made the following statement:

"On behalf of the Chinese Delegation I approve the able Report of the Third Committee now before us, and hope that the Assembly will adopt it today, because its adoption will place the long-hoped-for Court of International Justice within the reach of mankind—a Court which may be a pillar of support in the great edifice of universal peace which we all want to see built up and for ever maintained. .

"At the same time I wish to associate myself fully with my colleagues in voicing their sentiments in favour of compulsory jurisdiction, and to express my further hope that all the Members of the League, and other States as well, may see their way, when signing or ratifying the protocol referred to in Article 36 of the Draft Statute, to declare their acceptance of compulsory jurisdiction. My hope is all the more earnest, because China's faith in the ultimate supremacy of reason as contrasted with force is unbounded. Moreover, the compulsory jurisdiction referred to in Article 36 of the Draft Statute

51 The Advisory Committee of Jurists was composed of Adatci (Japan), Altamira (Spain), Descamps (Belgium), Fernandes (Brazil), Hagerup (Norway), de Lapradelle (France), Loder (Netherlands), Phillimore (Great Britain), Ricci-Busatti (Italy), and Root (United States).

52 For details of the discussion in the Committee, see *Minutes and Proceedings of the Advisory Committee of Jurists drafting the Statute of the Permanent Court of International Justice; Documents presented to the Advisory Committee of Jurists relating to Existing Plans for the Establishment of A Permanent Court of International Justice.*

53 See *Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court.* For the text of the Statute, see *League of Nations Treaty Series,* Vol. 6 (1921), pp. 391-413.

54 The Chinese member of the Third Committee was Tsang Tsai Fou.

is not of all-embracing nature, but, on the contrary, is expressly limited to certain classes of questions, which are all of a justiciable character. I believe, therefore, that concerted recognition of compulsory jurisdiction in these questions would constitute a modest but very desirable beginning in our common effort to discourage the use of force in international dealings, and to extend the reign of law everywhere in the family of nations." [55]

Evidently Dr. Koo fully agreed with the provisions of the Statute and sincerely hoped that the establishment of the Permanent Court of International Justice might be a pillar of world peace. It should be noted that the provision of Article 36 of the Statute, as it was finally adopted, "made the jurisdiction of the Court over cases of a legal nature optional with the member States rather than compulsory for all States adopting the Statute."[56] A Protocol of Signature[57] and the Optional Clause were opened for signature on December 16, 1920. The following is the provision of the Optional Clause:

"The undersigned, being duly authorised thereto, further declare, on behalf of the Government, that, from this date, they accept as compulsory, *ipso facto* and without special Convention, the jurisdiction of the Court in conformity with Article 36, §2, of the Statute of the Court, under the following conditions." [58]

The Chinese government effected the deposit of the deeds of ratifications of the Protocol and the Optional Clause on May 13, 1922.[59] In ratifying the Optional Clause, the Chinese government laid down the following condition:

"The Chinese Government recognizes as compulsory *ipso facto* and without special convention, in relation to any Member or State which accepts the same obligation, that is to say on the sole condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, §2, of the Statute of the Court for a period of five years." [60]

The Statute came into force in September, 1921, when the Protocol of Signature had been ratified by twenty-eight States. In accordance with Article 4 of the Statute, two general elections of judges and deputy-judges have been held: the first on September

[55] *Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, p. 243.

[56] E. C. Mower, *International Government*, p. 623.

[57] For the text of the Protocol, see *League of Nations Treaty Series*, Vol. 6 (1921), pp. 380-384.

[58] *Ibid.*, Vol. 6 (1921), p. 384.

[59] See *ibid.*, Vol. 6 (1921), pp. 411, 413.

[60] *Ibid.*, Vol. 6 (1921), p. 388.

14-16, 1921, for the period 1922-1930; and the second on September 25, 1930, for the period 1930-1939. Dr. Wang Ch'ung-hui, a Chinese statesman and jurist, was elected deputy-judge for the first period and judge for the second. He resigned by letter of January 15, 1936, and was succeeded by Cheng Tien-hsi, former Vice-Minister of Justice of the National Government, on October 8, 1936.[61]

The Chinese government has also shown its willingness to submit disputes with other nations to the Court for final judgment. Thus, in the communication sent by the Chinese delegation to the President of the Council of the League of Nations on October 24, 1931, the Chinese government suggested judicial settlement as one of the means to solve the Sino-Japanese controversies over treaty interpretations.[62] On the other hand, the Chinese government objected to the submission of disputes of political character to the Court for final decision. This attitude can be shown by the case of the denunciation of the Sino-Belgian Treaty of 1865.[63]

In pursuance of the provision of Article 46 of the Sino-Belgian Treaty of 1865 that a revision of the Treaty may be made after ten years if required, the Chinese government, on April 16, 1926, informed the Belgian government that it would regard the said Treaty as non-operative after October 27, 1926. The latter contended that the Belgian government, but not the Chinese government, had the right of proposing a revision of the Treaty after a period of ten years.[64] In reply to the Belgian proposal that the case be submitted to the Permanent Court of International Justice for final judgment,[65] the Chinese government, on November 16, 1926, sent a note to the Belgian minister at Peking, stating that the Belgian proposal was unacceptable.[66] An excerpt from the note reads as follows:

"As regards the proposal of the Belgian Government to bring the question of the interpretation of Article 46 of the Treaty of 1865 before the Permanent Court of International Justice, the Chinese Government, mindful of their obligations under Article 36 of the Statutes of the said Court, would be

61 See M. O. Hudson, *The World Court, 1921-1938*, pp. 5, 9, 10.
62 *Supra*, p. 171.
63 Hertslet, Vol. 1, No. 34.
64 See Art. 46 of the Sino-Belgian Treaty of 1865.
65 See the Note sent by the Belgian minister at Peking to the Ministry of Foreign Affairs of the Chinese government on November 10, 1926 (*China Year Book*, 1928, pp. 783-784).
66 *Ibid.*, p. 784.

prepared to discuss the possibility of invoking jointly with the Belgian Government the services of this highest international tribunal, if the Belgian Government had indicated a willingness to seek a solution on the broad basis of the universally recognized principle of equality in international intercourse and that of *ex aequo et bono*. For the point at issue between the two Governments is not the technical interpretation of Article 46 of the Treaty of 1865, an article which is a striking symbol of the inequalities in the entire instrument. This technical point had more than once been waived by the Belgian Government when it agreed to put an end to the Treaty of 1865 and conclude a new one to take its place. The real question at bottom is that of the application of the principle of equality of treatment in the relations between China and Belgium. It is political in character and no nation can consent to the basic principle of equality between States being made the subject of a judicial inquiry. A submission of the question of interpretation of Article 46 of the Treaty of 1865 to the aforesaid Court would serve merely to stress Belgium's desire to maintain in her favor the regime of inequality in China, and would in no way remove the obstacle which had stood in the way of the successful completion of the recent negotiations."

Upon the request of the Belgian government, the Permanent Court of International Justice took jurisdiction of the case and upheld the Belgian contention by a provisional Order of January 8, 1927. The Chinese government, being unwilling to submit disputes of political character for judicial settlement and insisting that the denunciation of the Sino-Belgian Treaty of 1865 was based upon the principle of equality, failed to respond to the Court's plea to file its counter-case. As a result of the conclusion of a new Sino-Belgian Treaty on November 22, 1928,[67] the dispute was finally settled and the Belgian government withdrew its judicial action.[68]

III. Settlement of International Disputes by Compulsive Means

Compulsive means of settlement of international disputes are measures of a non-amicable character taken by one State for the purpose of forcing another State to agree with what is required by the former. There are, in general, eight kinds of compulsive means in international practice: retorsion, reprisals, boycott, embargo,

[67] *League of Nations Treaty Series*, Vol. 87 (1929), pp. 287-295.

[68] For the judgments of the Permanent Court of International Justice, see *Publications of the Permanent Court of International Justice*, Series A, No. 8, Denunciation of the Treaty of November 2nd, 1865, between China and Belgium; A. D. MacNair and H. Lauterpacht, *Annual Digest of Public International Law Cases*, 1927-28, Case Nos. 350, 351.

pacific blockade, severance of diplomatic relations, intervention, and collective sanction. Although such means are of non-amicable character, there is still a sharp line between them and war.[69]

Retorsion

Retorsion is a measure of retaliation taken by one State against unfair action by another State. Such a measure is not internationally illegal. The Chinese government, however, has seldom resorted to this method, although the people have, on several occasions, had recourse to boycott for retaliation.[70] The following is an example of retorsion by governmental action. During the fourth decade of the nineteenth century, the British merchants smuggled a large quantity of opium into Canton. The retaliatory step taken by the Chinese government was to abolish entirely the 'passage boats', in which the opium was smuggled in Canton waters, by an order dated June 22, 1837. By another order of August 4, no foreign ships were allowed to anchor outside the port.[71] Although such acts were within the competence of the Chinese jurisdiction, they were unfriendly and discourteous measures against the constant smuggling of opium by British merchants into Canton.

Reprisals

Unlike retorsion, reprisals are the means to realize ends without being bound by the limitations otherwise imposed by the rules of international law. When a State resorts to reprisals against the international delinquency of another State, various retaliatory measures short of war can be used for the purpose of seeking satisfactory reparation. The Sino-Russian controversy in 1929 can be cited as an illustration.

In violation of the Sino-Soviet Agreement of May 31, 1924,[72] the Chinese Eastern Railway had been used for years by the Soviet employees as the center of Bolshevik propaganda radiating to all parts of China, and the Soviet consulate at Harbin was in turn the place where Soviet activities were focussed. The Chinese government decided to take a strong measure of retaliation. On May 27,

[69] See L. Oppenheim, *op. cit.*, Vol. 2, pp. 110-111.
[70] *Infra*, pp. 177-178.
[71] See H. B. Morse, *The International Relations of the Chinese Empire*, Vol. 1, pp. 191-193.
[72] *Supplement to MacMurray's Treaties*, pp. 133-140.

1929, the Soviet consulates at four places on the line of the Chinese Eastern Railway were raided by the Chinese local police. At the Harbin consulate, over eighty Russian nationals were holding a meeting. When the search was completed, all those present in the consulate were detained with the exception of the three consular officers and forty-three members of the consulate staff. On July 10, the Chinese local authorities took over the telegraph and telephone systems belonging to the Chinese Eastern Railway, and closed down the premises of the Soviet trade mission, labor organization, and other agencies. At the same time, about a thousand Chinese nationals had been arrested in Soviet Russia. Eventually the diplomatic relations between the two countries were completely ruptured on July 20, 1929.[73]

Boycott

Boycott as a compulsive means of settling international disputes has been generally recognized since the World War. Paul Fauchille remarks: "The process of boycott was recognized in 1919 by most States as a means of legitimate pressure, which could, and even should, under certain circumstances, be employed by the Government."[74] As an effective measure of retaliation, it may be used as a weapon of collective sanction against aggressors. This was incorporated in Article 16 of the Covenant of the League of Nations.[75] It may be enforced by the Government of a State as in the case of the boycott by Soviet Russia against Switzerland in 1923.[76] In the case of the Chinese boycott against foreign goods, it is merely the abstention of an individual from buying or utilizing the goods of a certain origin, or from establishing relations with the merchants and industrialists of a certain nationality, or from engaging the services of the enterprises of that nationality.

The notable Chinese boycotts against foreign goods were in 1905 against the United States, in 1908 against Japan, in 1926 against

[73] See A. J. Toynbee, *op. cit.*, 1929, pp. 344-351; *China Year Book*, 1931, pp. 495-496. Diplomatic relations between the two countries were resumed December 13, 1932. See *ibid.*, 1933, pp. 655-656.

[74] Paul Fauchille, *Traité de droit international public*, Vol. 1, Pt. 3, p. 702.

[75] For details, see *infra*, pp. 184-185.

[76] By way of retaliation for the inaction of the Government of Switzerland in connection with the assassination of Vorovsky, the Soviet delegate to the Lausanne Conference, within the territory of Switzerland, the Soviet Government promulgated a Decree of June 20, 1923, by which an economic boycott was declared against Switzerland. See T. A. Taracouzio, *The Soviet Union and International Law*, pp. 300-301.

Great Britain, and in 1931 against Japan.[77] Boycott as a means of peaceful resistance has been considered by the Chinese people as a double-edged sword:

"It does not only inflict losses upon the party against which it is directed, but also upon the one who uses it, and commerce is injured by its repercussions. The Chinese people have resorted to boycott as an expression of their sentiment of national devotion and patriotic indignation, notwithstanding the considerable sacrifices which their own interests must bear. Because they are profoundly peace-loving they prefer to use legal means of action, though very costly to themselves, rather than to resort to armed reprisals which inevitably lead to a state of war."[78]

The Chinese government has maintained that the government cannot be held responsible for a boycott movement among the people against foreign goods.[79] Because of the harshness of the American exclusion laws, the Chinese people in 1905 inaugurated a boycott against American goods. The government of the United States, in a note sent by Mr. Rockhill, American minister at Peking, to Prince Ch'ing on August 7, 1905, charged the Chinese government with direct responsibility for any loss American interests might have sustained.[80] In reply, Prince Ch'ing maintained that the movement of boycott against American goods came directly from the merchants and that the Chinese government could not assume the responsibility.[81] However, orders were repeatedly issued

[77] For a systematic study of the Chinese boycott, see C. F. Remer and W. B. Palmer, *A Study of Chinese Boycotts with Special Reference to Their Economic Effectiveness* (1933).

[78] Koo, *Memoranda,* Vol. 1, pp. 53-54.

[79] This attitude can be well supported by the authoritative statement of Paul Fauchille:

"A State cannot compel her nationals or her residents to carry on commerce with the citizens of a given country when they do not wish to do so; if by the treaties with that country the State permits commercial relations with the former, she does not guarantee that these relations will be established or will continue." (Fauchille, *op. cit.,* Vol. 1, Pt. 3, p. 701).

[80] *U. S. For. Rel.,* 1905, p. 214.

[81] See the Note sent by Prince Ch'ing to Mr. Rockhill, American minister at Peking, on August 26, 1905 (*U. S. For. Rel.,* 1905, pp. 222-223). Practically, the United States took the same attitude. On March 18, 1897, the Japanese minister at Washington protested to the American government because of a boycott organized in the State of Montana by the workers' unions against Japanese and Chinese residents with a view to forcing them to leave their employment and profession. Measures of exclusion were taken by the Legislature of the State. On March 31, the Secretary of State of the United States replied:

" . . . the Attorney-General, of whom I requested an opinion whether any act of Congress protects citizens of other countries in such employment and whether there is any remedy for the boycott complained of by you, advises me, under the date of the 27th instant, that there is no Statute of the United States which makes the acts you describe a criminal offence against the United States, and that redress for the legislation or acts complained of, if there is any, of which he expresses no opinion, is by suit or action by the person or persons injured." (*Ibid.,* 1897, p. 368).

by the Chinese government to the viceroys and governors, instructing them to make all efforts to stop the boycott.[82]

After the massacre of the Chinese people in Corea and later the Japanese invasion of Manchuria, a vigorous movement of boycott against Japanese goods was inaugurated in China in 1931. The legitimacy of exhortation to boycott was challenged by Japan. In the Memoranda presented to the Lytton Commission by Dr. V. K. Wellington Koo, assessor, the Chinese view toward boycott was explained as follows:

"So far as the boycott is concerned, a distinction should also be made between lawful activities and illegal acts.

"The boycott in its simple form, that is to say, individual abstention from buying products of a certain origin is not prohibited anywhere by law, and it is a spontaneous, legitimate manifestation.

"The individual boycott by a customer may be against a wholesale or retail merchant. No matter in what scale of business transaction boycott is practiced, it is not inhibited by law.

"If individual boycott is lawful, then advising others to boycott through legal means is no less lawful, because it could not be contrary to law in persuading one's fellow-citizens to do a thing permitted by law.

"The legal means of persuasion are authorized by the Constitution such as words, personal proceedings, sending of circulars, speeches in public meetings, manifestations, all that is within lawful limits, that is to say, provided that public order is not jeopardized.

"If individual boycott and stimulation for boycott are legitimate, the associations formed for the purpose of boycotting are only the collective expression of the same sentiments.

"One cannot find in Chinese legislation any provision, applicable to the present case, which calls for interference with any of the activities described above." [83]

Moreover, the Chinese boycott had not been directly against Japanese merchants in China. All the goods sealed were the property of Chinese merchants. When the Japanese merchants were annoyed or their goods jeopardized as a result of some confusion or excess of zeal, these mistakes were redressed and the goods returned immediately. So the Chinese boycott did not cause direct damage to Japanese subjects, who could also bring suits in the Chinese judicial courts for remedy if there was any injury done to them. Whenever the boycott agitators resorted to violence and intimidation which endangered personal right and freedom, they

[82] For details, see *U.S. For. Rel.*, 1905, pp. 204-234.
[83] Koo, *Memoranda*, Vol. 1, pp. 52-53.

were subject to punishment according to Chinese law. The judicial court did not hesitate to execute the law even though the illegal acts were motivated from patriotism. This attitude can be shown by a case decided by the District Court of the First Special Administrative District, Shanghai, Kiangsu. Owing to its importance, the facts, decisions, and reasons are fully given as follows:

FACTS

Ko Yun-ting is the secretary of the Shanghai anti-Japanese and National Salvation Association and Sze Sin-min, Yang Hai-chang and Chü Tsung-yen are inspectors of the same association.

On November 22nd, 1931, this association received two letters giving the information that a certain Tang Chun-hwo is secretly selling in his premises, the Ta-ching Gauze store, located in No. 1, Chung-sin Li, Ningpo Road, Japanese gauze under the name of *Kuo Huo* (national product) etc. Ko Yun-ting and the others along with four coolies, whose whereabouts until now are still unknown, went to the above-mentioned store and seized 11 bundles consisting of 220 pieces of oblique striped cloth under the trade mark of 'Ten Beauties' manufactured by the Shih-chuan Factory in Woosung. These were transported to the General Chamber of Commerce in Shanghai for examination. Lee Chia-foo and Wu Ju-kang, employees of the store, tried to stop them but in vain. Whereupon Wu Ju-kang notified the police. The defendants were arrested when they were filling in the receipts of the goods. They were being prosecuted under Article 348 of the Criminal Code.[84]

DECISION

Ko Yun-ting, Sze Sin-min, Yang Hai-chang and Chü Tsung-yen were found guilty on the ground that they resorted to violence and intimidation which endanger personal right and freedom. They should be fined $20 each or one day imprisonment to $3 for the fine: penalty is deferred for two years.

REASONS

According to the Criminal Code, an act of robbery can be sustained only when it is proved that it is illegally done for oneself or for a third party. In the present case, the defendants were instructed by the Shanghai Anti-Japanese and National Salvation Association to proceed to the Ta-ching Gauze store to bring back 11 bundles of 'Ten Beauties' oblique striped cloth for examination to see whether they are national products. The defendants did not do it for themselves or for a third party. Therefore the robbery charge could not be sustained. However, the defendants did not receive the approval of the proprietor of the store when they took the cloth and it was done by force. This fact is proved by the appearance of the proprietor Tang Chun-hwo, and his employees Wu Ju-kang and Lee Chia-foo. The defendants did not

[84] The defendants were charged with robbery by the Louza Police Station of the Shanghai Municipal Council.

raise any objection. Such action really endangers the personal right and freedom of others and there is no doubt that Article 318 of the Criminal Code is violated. But leniency should be granted to the defendants because they committed a crime due to the over-expression of patriotism and because every one of them has legitimate business and has never been arraigned in the court before. For these reasons, Article 90 of the Criminal Code should also be applied and penalty should be deferred for two years.

According to the above statements, the defendants, Ko Yun-ting, Sze Sin-min, Yang Hai-chang and Chü Tsung-yen should be dealt with by Article 42, Section 1 of Article 318, Sections 2 and 3 of Article 55 and No. 1 of Section 1 of Article 90. Therefore the above-mentioned decision should hold.

If the defendants do not accept this decision, they may, within ten days beginning from the second day of the delivery of the said decision, appeal to the High Court of Kiangsu, Shanghai Section.[85]

Embargo

The technical meaning of embargo is the detention of ships in port, whether they be national or foreign. In the broad sense of the term, it includes "the detention within the national domain of ships or other property otherwise likely to find their way to foreign territory."[86] The Chinese attitude toward embargo is inconclusive. In the provisions of several treaties concluded between China and other nations, embargo was prohibited. The Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, signed at Canton on March 20, 1847, for example, provides:

"Subjects of His Majesty the King of Sweden and Norway, their vessels and property, shall not be subject to any embargo; nor shall they be seized or forcibly detained for any pretence of the public service; but they shall be suffered to prosecute their commerce, in quiet, and without molestation or embarrassment." [87]

On the other hand, the Chinese government has, on several occasions, resorted to embargo against a disputing party. Because of the constant smuggling of opium by British merchants into Canton during the fourth decade of the nineteenth century, the Chinese government enforced an embargo against British trade with Canton. However, cargoes of British goods continued to arrive in British ships, notwithstanding the fact that they could not, legally

[85] Koo, *Memoranda,* Vol. 1, pp. 429-431.

[86] C. C. Hyde, *op. cit.,* Vol. 2, p. 182.

[87] Art. XXVIII. Similar provisions were included in: Art. III of the Treaty of Friendship, Commerce, and Navigation between France and China, 1844 (Hertslet, Vol. 1, No. 39); Art. XIV of the Treaty of Friendship, Commerce, and Navigation between Belgium and China, 1865 (*Ibid.,* Vol. 1, No. 34).

and openly, be sent to Canton. By an Imperial Decree of December 29, 1840, the Chinese government appointed Commissioner Lin to the Canton viceroyalty, confirming the decision to place a strict embargo on British trade.[88] Another striking case was in connection with Russia. At the instance of the British minister at Peking in 1918, the Chinese government prohibited every kind of exportation from Manchuria into Siberia as a measure against the Bolshevik Revolution.[89] A more recent case was in connection with Italy. In compliance with the resolution of collective sanctions against Italy adopted by the League of Nations, the Chinese government enforced, as from December 1935, an embargo on trade with Italy.[90]

Pacific Blockade

Since the second quarter of the nineteenth century, pacific blockade has sometimes been used by States as a compulsive means of settling international disputes. It denotes the prevention of access to or egress from foreign ports or coasts by naval forces of a State in order to compel the disputing party to yield to its demands. The admissibility of pacific blockade has not been unanimously accepted by international lawyers. The Chinese government has never adopted such a measure against any foreign nations, although certain of them had, on several occasions, enforced pacific blockades against China. The British blockade of the river and port of Canton in 1839 and in 1857,[91] and the French blockade of the Island of Formosa in 1884[92] are conspicuous examples. Because neither China nor Japan has declared war in the present hostilities begun July 7, 1937, the Japanese blockade of the Chinese coast can be technically called pacific blockade.

Severance of Diplomatic Relations

The severance of diplomatic relations is a measure short of war. It is sometimes used by one State to impress upon the disputing party the desirability of making satisfactory settlement. During

88 See H. B. Morse, *op. cit.*, Vol. 1, pp. 195, 199, 257, 258.

89 See the Dispatch sent by Mr. Reinsch, American minister at Peking, to the Secretary of State, January 28, 1918. (*U. S. For. Rel.*, 1918, Russia, III, p. 172).

90 For details, see *China Year Book*, 1936, pp. 184-185; also *infra*, pp. 184-185.

91 See *Br. and For. St. Papers*, Vol. 29 (1840-1841), p. 1069; Vol. 34 (1845-46), pp. 1260-61; Vol. 47 (1856-57), p. 560.

92 See *ibid.*, Vol. 75 (1883-84), p. 494; Vol. 76 (1884-85), pp. 1020, 1080.

the World War, the Chinese government protested, on February 9, 1917, against the German policy of using submarines to sink neutral and belligerent merchantmen. Considering its protest ineffectual, the Chinese government announced the severance of diplomatic relations with Germany on March 14, 1917. The following is the Presidential Proclamation to this effect issued on the same date:

"China has observed strict neutrality since the outbreak of the war in Europe. A note, however, was received from the German Government on the 2nd day of the 2nd month of this year, warning us of the danger to neutral ships sailing from this day in certain zones as defined according to the new blockade declared by Germany, etc. The Government thereupon decided that, inasmuch as the German methods of attacking merchant ships had already caused a considerable loss of Chinese life and property and as the new submarine policy would even cause a greater danger, China—moved by the desire to uphold international law and to discharge the duty of protecting the life and property of our people—lodged a strong protest with the German Government and stated that, unless Germany withdrew her new policy, China would be compelled to sever diplomatic relations with Germany. It was then hoped that Germany would not persist in her policy but would maintain the friendly relations hitherto existing between the two countries. But a month has passed; and Germany has not yet abandoned her submarine warfare. On the contrary, many merchant ships of many countries have been sunk; and on several occasions our people have suffered loss of life. A formal reply was received from the German Government, stating that it was difficult for Germany to cancel her blockade policy. This is, indeed, disappointing to us. In the cause of international law and in the interests of the protection of the life and property of our people, the existing diplomatic relations with Germany are hereby severed." [93]

A recent instance is the severance of diplomatic relations between China and Japan as a result of the prolonged hostilities, if not war, since July 7, 1937.[94]

Intervention

Intervention in general is dictatorial interference by one State in the domestic affairs of another; while intervention as a means of settling international differences "consists in the dictatorial interference of a third State in a difference between two States, for the purpose of settling the difference in the way demanded by the

[93] MacMurray, Vol. 2, p. 1369.
[94] See *China Year Book*, 1938, p. viii.

intervening State."[95] With regard to intervention in general, the Chinese government has always held the attitude that "no State has the right of intervention in the administration of exclusively domestic affairs of another State."[96] Such attitude can be shown by the strong protests sent by the Chinese government against the Japanese intervention in Shantung in 1928,[97] and against Soviet Russia's interference with Chinese territorial integrity by signing a protocol with Outer Mongolia on March 12, 1936.[98]

On the other hand, the dictatorial interference of the third State or States in a dispute between China and other nations has been acceptable to the Chinese government. As a result of the Treaty of Peace between China and Japan, signed at Shimonoseki on April 17, 1895,[99] the Liao-Tung Peninsula or the southern portion of Feng-Tien province was ceded to Japan.[100] However, before the exchange of ratifications of the Treaty at Chefoo on May 8, 1895, Russia, France, and Germany intervened by sending a joint note to the Japanese government demanding that the Liao-Tung Peninsula be restored to China. It was said that, before the conclusion of the Treaty, China had an understanding with Russia and France about the intervention.[101] Subsequently Japan yielded to the demand of the three Powers, and the Liao-Tung Peninsula was retroceded to China by the conclusion of the Sino-Japanese Convention of November 8, 1895.[102]

Collective Sanction

The collective sanction as a means of enforcing recourse to pacific means of settling disputes between nations is comparatively a new

[95] Oppenheim, *op. cit.*, Vol. 2, p. 130. For theories of intervention, see J. L. Brierly, *The Law of Nations*, pp. 247-250; J. B. Moore, *A Digest of International Law*, Vol. 6, Secs. 897-926; C. C. Hyde, *op. cit.*, Vol. 1, Secs. 69-97; W. E. Hall, *A Treatise On International Law*, Secs. 88-95; C. Calvo, *Le droit international: théorique et pratique*, Vol. 1, Secs. 110-206; A. Rivier, *Principes du droit des gens*, Vol. 1, Sec. 31; H. W. Halleck, *International Law*, Vol. 1, pp. 102-104; F. Wharton, *A Digest of the International Law of the United States*, Vol. 1, Secs. 45-72; H. G. Hodges, *The Doctrine of Intervention;* E. C. Stowell, *Intervention In International Law*; P. H. Winfield, "The Grounds of Intervention," *Brit. Yr. Bk. Int. Law*, Vol. 5 (1924), pp. 149-162; P. H. Winfield, "The History of Intervention in International Law," *ibid.*, Vol. 3 (1922-23), pp. 130-149.

[96] Koo, *Memoranda*, Vol. 1, p. 416.

[97] See *China Year Book*, 1929-30, pp. 878-893.

[98] See *ibid.*, 1936, pp. 21-23.

[99] Hertslet, Vol. 1, No. 62.

[100] Art. II, Par. 2.

[101] H. B. Morse, *op. cit.*, Vol. 3, p. 47.

[102] Hertslet, Vol. 1, No. 63.

international practice. Article 16 of the Covenant of the League of Nations provides:

"Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13, or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and nationals of the covenant-breaking State, and prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not."

In pursuance of this provision, a resolution of collective sanctions against Italy in connection with the latter's invasion of Ethiopia was adopted at a meeting of the League of Nations Co-ordination Committee on October 14, 1935. The essentials of the resolution are the severance of all financial and economic relations with Italy and the prohibition of exportation, re-exportation or transit to Italy and Italian possessions of arms, munitions and implements of war.[103] Fully realizing China's obligation as a member of the League of Nations, the Chinese government enforced, as from December 1935, an embargo on trade with Italy. The sanctions were later cancelled in accordance with the League resolution by the following Customs Notification (No. 1529) on July 15, 1936:

"With reference to Customs Notification No. 1478: notifying the enforcement of certain restrictions on commercial intercourse with Italy; the public is hereby notified that, in accordance with Government instructions, the above restrictions are withdrawn as from today's date."[104]

League action in the form of collective sanctions against Japan has not materialized. At a meeting of the nineteenth session of the Assembly of the League of Nations on September 16, 1938, Dr. V. K. Wellington Koo, the Chinese delegate, appealed to the League to resort to Article 17 of the League Covenant against the Japanese invasion of China.[105] Since Japan is no longer a member of the League, Article 16 cannot be applied. But Article 17 includes disputes involving non-members:

[103] See *China Year Book*, 1936, pp. 184-185; Toynbee, *op. cit.*, 1935, Vol. 2, pp. 212-239.
[104] *Ibid.*, 1936, p. 185.
[105] See *Monthly Summary of the League of Nations*, September, 1938, p. 216; *New York Times*, September 17, 1938.

"In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16, inclusive, shall be applied with such modifications as may be deemed necessary by the Council."[106]

On September 19, the Chinese delegate made the same demand before the Council, which thereby sent to the Japanese government a telegram inviting it, in accordance with Article 17, Paragraph 1 of the Covenant, to comply with the obligations devolving upon the members of the League for the settlement of their disputes. In its reply on September 22, the Japanese government formally notified the Council that it declined the invitation.[107] According to Article 17, Paragraph 3 of the Covenant, "if a State so invited shall refuse to accept the obligations of Membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action." The Council held serious discussions on the situation thus created and, on September 30, adopted a draft report by its President. The important points of the report are as follows:

"In view of Japan's refusal of the invitation extended to her, the provisions of Article 16 were, under Article 17, Paragraph 3, applicable in present conditions, and the Members of the League were entitled to act as before on the basis of that finding, and also to adopt individually the measures provided for in Article 16. As regards co-ordinated action in carrying out such measures, it was evident from the experience of the past that all elements of co-operation which were necessary were not yet assured."[108]

The Chinese delegate accepted the report, but reserved the right to ask later for such co-ordination.[109] To date, no member of the League applies Article 16 of the Covenant against Japan.

[106] Art. 17, Par. 1.
[107] *New York Times*, September 20, 1938; *Monthly Summary of the League of Nations*, September, 1938, p. 216.
[108] See *ibid.*, September, 1938, p. 217; *New York Times*, October 1, 1938.
[109] See *New York Times*, January 18, February 20, 21, 1939.

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Note

This bibliography is confined to the sources cited in the footnotes. Numerous other documents, treatises, such as the *British Treaty Series* and *Documents Diplomatiques Français,* have been carefully examined or consulted, but are not included in the bibliography because the material essentially duplicates what is otherwise included. Collections of laws and treaties, which contain almost all the laws and treaties relating to China which are still in force, have been extensively used throughout the study. The secondary sources consist of two kinds: those dealing with international law or with Chinese foreign relations in general; and those referred to in the footnotes for further information or reference with respect to certain phases of international law or Chinese foreign relations, which have already been treated by other writers and which are only briefly discussed in this study. Lastly, mention should also be made of the writer's preference for using English publications in the present research, materials available only in other languages being translated into English if cited.

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